Supreme Court, U. S.
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APPENDIX

In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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Filed March 5, 1976
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation,

Plaintiffs,

v.

James E. Douglas, Jr.,

Defendant.

DOCKET ENTRIES

July 14, 1975—Plaintiffs filed Complaint, Motion for Preliminary Injunction, Motion for Ex parte Temporary Restraining Order.

July 15, 1975—Hearing on Motion for Ex parte Temporary Restraining Order; Motion denied; Order entered requesting designation of three-judge court.

July 18, 1975—Order entered designating three-judge court.

August 1, 1975—Defendant filed Answer and Motion to Abstain.

October 1, 1975—Plaintiffs filed Motion for Summary Judgment.

October 15, 1975—Hearing before three-judge court on Motion for Summary Judgment, Complaint, Motion for Preliminary Injunction, Motion to Abstain.

November 7, 1975—Final Order entered granting Plaintiffs' Motions for Summary Judgment and Injunction.

January 5, 1976—Appellant's Notice of Appeal filed with lower court.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

1. Plaintiff The New Smith Meal Company, Inc., (hereinafter sometimes referred to as "Smith Meal") is a corporation organized under the laws of the Commonwealth of Massachusetts and has its principal place of business at Port Monmouth, New Jersey. Plaintiff Second Oceanic Corporation (hereinafter sometimes referred to as "Oceanic") is a corporation organized under the laws of the State of New York and has its principal place of business at Amagansett, New York. Plaintiff Seacoast Products, Inc. (hereinafter sometimes referred to as "Seacoast") is a corporation organized under the laws of the State of Delaware and has its principal place of business at Port Monmouth, New Jersey. These three corporations are, within the meaning of United States Code, Title 28, Section 1332 citizens of the States of Massachusetts, New Jersey, New York and Delaware. Defendant James E. Douglas, Jr. is Commissioner of the Virginia Marine Resources Commission and is also a citizen of the State of Virginia and the United States.

2. The controversy is, therefore between citizens of different states of the United States and also arises, as hereinafter more particularly shown under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00) as to each individual Plaintiff, exclusive of interest and costs. Jurisdiction is therefore conferred upon this Court by the provisions of the United States Code, Title 28, Sectons 1331 and 1332.

3. This action is brought to restrain the enforcement by Defendant, who is by law charged with such enforcement, of certain statutes of the State of Virginia, namely Virginia Code Section 28.1-81.1 and portions of Section 28.1-60(3) upon the grounds that said statutes are unconstitutional; this action is required by the provisions of the United States Code, Title 28, Sections 2281 to 2284, inclusive, to be heard before a Court of three judges to be convened in accordance with the provisions of said statutes.

4. Plaintiffs Oceanic and Smith Meal are wholly-owned subsidiaries of Seacoast which in turn through intermediary corporations is controlled by Hanson Trust Limited, a corporation organized and existing under the laws of the United Kingdom.

5. Seacoast Products, Inc., through its own operations and those of its subsidiaries, including Oceanic and Smith Meal, is engaged in the business of fishing for menhaden and in processing the catch for commercial purposes. The entire catch of the vessels owned by Smith Meal is furnished to Seacoast for processing. This processing results in three products, mainly fish meal, used principally for poultry feed, fish solubles, an ingredient of animal feed, and fish oil, exported primarily to Europe and Canada for use in the manufacture of margarine.

Fish oil is also used domestically for certain industrial purposes. The business of Plaintiffs constitutes a major seg-

ment of the American menhaden industry, an industry which is important to the health, welfare and economic well-being of many citizens and residents of the United States. Such business is dependent upon the catching of menhaden within the territorial waters of coastline states, including Virginia.

6. Menhaden is a species of migratory fin fish which during their summer migration remain close to the shore line. Fishing for menhaden is commercially feasible only during their summer migration when they are close to the shore where they travel in large, closely packed schools. Practically all menhaden are caught within three miles of the shore.

7. From approximately June through October of each year, large quantities of menhaden are found within the territorial waters of the states bordering on the Atlantic Ocean. During those months, commercial fishing for menhaden is effected within the territorial waters of a particular state where menhaden at that time appear, whether such state be Virginia or some other state bordering on the Atlantic Ocean.

8. Plaintiff Seacoast and its subsidiaries and predecessors have, over the years caught substantial amounts of menhaden within the territorial waters of the State of Virginia and in so doing have lawfully applied for and received non-resident licenses for such activities from the Virginia Marine Resources Commission. With each of these applications for a license has gone an executed power of attorney appointing the Secretary of the Commonwealth of Virginia as agent for the applicant for service of process within that jurisdiction as required by Virginia Code Section 28.1-60(5).

9. Plaintiff Seacoast and its subsidiaries operate a fleet of roughly 30 fishing vessels employing over 450 persons as

crews thereon, all of whom are American citizens. In addition, Plaintiff Seacoast owns and operates processing plants at Port Monmonth, New Jersey, as well as Morgan City, Abbeville and Cameron, Louisiana, with terminals for fish meal at Lewes, Delaware and Sabine, Texas plus shipyards for repair of vessels at Salisbury, Maryland and Abbeville, Louisiana. Plant and other personnel approximate over 500 persons, over 95 percent of whom are United States citizens.

10. Virginia Code Section 28.1-60(3) precludes non-residents of this Commonwealth from fishing in Chesapeake Bay for menhaden by denying them a license for such activity. The statute provides that:

> A non-resident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of the straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided, such person, firm or corporation has applied for and obtained a license to take and catch such fish within the above-defined area and in accordance with the following requirements.

An application for such non-resident commercial licenses for the taking of menhaden is then outlined in Virginia Code Section 28.1-60(3) and provides that such licenses shall be granted after the Commissioner of Marine Resources is fully satisfied that the statements contained in said application are true. But Plaintiffs are denied the right to pursue menhaden into Chesapeake Bay even with a license because of their non-residency.

11. Furthermore, Virginia Code Section 28.1-81.1 which was passed as special "emergency" legislation during the 1975 session of the Virginia General Assembly and became effective March 19, 1975 states that:

> (a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.
>
> (b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five percentum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.
>
> (c) Seventy-five percentum of the interest in a corporation shall be deemed to be owned by citizens of the United States (i) if the title to seventy-five percentum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five percentum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five percentum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

12. On May 22, 1975, Plaintiff Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license as it had routinely done in the past. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Marine Resources Commission, Smith Meal was informed that such licenses were not available to corporations held directly or indirectly by foreign interests, citing Virgina Code Section 28.1-81.1. Pursuant to said statute, if same is valid, Smith Meal can no longer obtain a license to take menhaden as Smith Meal is not a citizen of the United States within the meaning of said statute.

13. The commercial menhaden industry in the United States is divided primarily among three corporations which account for the bulk of the menhaden fishing which is done in this country. Zapata Haynie Corporation is the largest of these organizations in terms of volume. Plaintiff Seacoast is the second largest, while Standard Products Company, Inc. is third. Both the first and third largest menhaden fishers are *domestic Virginia corporations.* The newly enacted law would apply to the only one of said corporations which is not a Virginia corporation and would preclude only

Seacoast and its subsidiaries from fishing in Virginia's territorial waters.

14. Virginia Code Section 28.1-81.1 and those portions of Section 8.1-60(3) precluding non-residents from fishing for menhaden in Chesapeake Bay violate the rights of the Plaintiffs under the Constitution of the United States and the Amendments thereto in the following particulars:

(a) They deprive the Plaintiffs of the equal protection of the laws, in violation of the provisions of Article XIV, Section 1 of the Amendments to the Constitution of the United States;

(b) They deprive the Plaintiffs of liberty and property without due process of law, in violation of the provisions of Article XIV, Section 1 of the Amendments to the Constitution of the United States.

(c) They impose an unreasonable restriction on interstate commerce in violation of the Commerce Clause, Article 1, Section 8 of the Constitution of the United States.

15. As noted, the height of the menhaden fishing season occurs during the summer months. Hence, plaintiffs will suffer substantial losses unless they are afforded an immediate preliminary injunction which would be effective until these matters have been resolved.

Wherefore, the Plaintiffs demand judgment against the Defendant and pray that the Defendant may be both temporarily and permanently restrained and enjoined from enforcing the aforesaid provisions of the statutes of Virginia hereinbefore complained of, and that this Court may enter a Declaratory Judgment in accordance with the provisions of the United States Code, Title 28, Sections 2201 and 2202, declaring that the provisions of said statutes of

Virginia are null, void and have no effect, as being a contravention of the applicable provisions of the Constitution of the United States and Amendments thereto. The Plaintiffs also hereby make application for a preliminary injunction, pending a final hearing of said action upon the merits, restraining and enjoining the Defendants from enforcing or attempting to enforce such statutes, and pray that said application for a preliminary injunction be heard in accordance with the provisions of United States Code, Title 28, Sections 2281-2284, inclusive, upon the earliest practicable day and that the necessary three-judge Court may be forthwith convened for the purpose of hearing said application.

Seacoast Products, Inc.,
Second Oceanic Corporation, and
The New Smith Meal Company, Inc.

By /s/ T. H. Willcox, Jr.
Of Counsel

T. H. Willcox, Jr., Esq.
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1800 Virginia National Bank Building
Norfolk, Virginia 23510
Attorneys for Plaintiffs

[Certificate of service omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

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MOTION FOR ISSUANCE OF EX PARTE RESTRAINING ORDER

Now comes the Plaintiffs, by counsel, and pursuant to Federal Rule 65(b), to move this Court for an *ex parte* restraining order enjoining the Defendant from enforcing Virginia Code Section 28.1-81.1 upon the grounds and for the reasons outlined in the Affidavit of David H. Clarke, President of Plaintiffs Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, attached hereto and made a part hereof.

Wherefore, Plaintiffs move for the issuance by this Honorable Court of such an *ex parte* restraining order under the provisions of Rule 65(b). Notice of the presentation of this application has been given to the Defendant.

Seacoast Products, Inc.,
Second Oceanic Corporation and
The New Smith Meal Company, Inc.

By /s/ Thomas H. Willcox, Jr.
Of Counsel

T. H. Willcox, Jr., Esq.
Willcox, Savage, Lawrence,
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1800 Virginia National Bank Building
Norfolk, Virginia 23510
Attorneys for Plaintiffs

[Certificate of service omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

ANSWER

Comes now the defendant, James E. Douglas, Jr., Commissioner of Marine Resources of the Commonwealth of Virginia, by counsel, and in response to the Complaint and Motion for Preliminary Injunction, represents as follows:

1. The allegations contained in paragraphs 1, 2 and 3 are admitted.

2. The allegations contained in paragraphs 4, 5, 6, 7, 8, and 9 are neither admitted nor denied.

3. The allegations contained in paragraphs 10, 11 and 12 are admitted.

4. The allegations contained in paragraph 13 are neither admitted nor denied.

5. The allegations contained in paragraph 14 are denied.

6. The allegations contained in paragraph 15 are neither admitted nor denied.

James E. Douglas, Jr.

By: /s/ James E. Moore
Counsel

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

MOTION TO ABSTAIN

Comes now the defendant, James E. Douglas, Jr., Commissioner of Marine Resources of the Commonwealth of Virginia, by counsel, and moves this Court for entry of an order staying any further proceedings in this Court until the Supreme Court of Virginia has been afforded the opportunity to determine the issues here presented with respect to construction and constitutionality of the statutes in question. In support thereof, the defendant represents the following:

1. The statutes here in question are laws of the Commonwealth of Virginia which have not been interpreted or judged as to their constitutionality in the Courts of the State of Virginia.

2. There are various procedural means, under Virginia law, which would afford the plaintiffs means for obtaining state court review and interpretation of the statutes in question. See § 28.1-33, § 8-578, § 8-704, Code of Virginia (1950), as amended.

Respectfully submitted,

James E. Douglas, Jr.

By: /s/ James E. Moore
Counsel

[Certificate of service omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move upon the annexed affidavit of David H. Clarke and the pleadings herein under Rule 56 of the Federal Rules of Civil Procedure for entry of Summary Judgment for Plaintiffs.

Seacoast Products, Inc.
The New Smith Meal Company, Inc.
Second Oceanic Corporation

By /s/ T. H. Willcox, Jr.
Of Counsel

T. H. Willcox, Jr.
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1800 Virginia National Bank Building
Norfolk, Virginia 23510

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 75-69-NN
(Three-Judge Court)

Seacoast Products, Inc., The New Smith Meal Company, Inc. and Second Oceanic Corporation,

Plaintiffs,

v.

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission,

Defendant.

FINAL ORDER

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, Adjudges, Orders and Decrees:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained:

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any of them is hereby restrained and enjoined fro mthe enforcement against the plaintiffs or any of them of the statutes designated as

Code of Virginia §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiffs recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 75-69-NN

Seacoast Products, Inc., The New Smith Meal Company, Inc. and Second Oceanic Corporation,

Plaintiffs,

v.

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission,

Defendant.

Three-Judge Court

Argued: October 15, 1975 Decided: November 7, 1975

Before Bryan, Senior Circuit Judge, Kellam, District Judge and MacKenzie, District Judge.

T. H. Willcox, Jr., of Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Virginia, counsel for plaintiffs; James E. Moore, Assistant Attorney General [Andrew P. Miller, Attorney General], Richmond, Virginia, counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three miles[1] of her coast. Plaintiff, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virgina *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights

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[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 US 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 USC 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 USC 2281 and 2284.

[3] There are no critical, genuine factual differences betwen the parties.

under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention have no place. In other circumstances they are appropriate: to obtain interpretation of a State statute, Railroad Commission v. Pullman Co., 312 US 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 US 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 US 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 US 592, 602 (1975); *Younger,* supra, at 53-54; Swickler v. Koota, 389 US 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not purposed

to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 US 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any

state' on an equality of legal privileges with all citizens under non-discriminatory laws.

Incidentally, the Court in both *Takahashi,* supra, at p. 420, and in Toomer v. Witsell, 334 US 385, 401 (1948) declined to treat, as *contra,* McCready v. Virginia, 94 US 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 USC 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . ,"except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 US 385, 393, 394 (1948); United States v. California, supra, 332 US 19 (1947); Skiriotes v. Florida, 313 US 69, 75 (1941); Manchester v. Massachusetts, 139 US 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 USC 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 USC 808, 839. He acted

only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters agains depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-mile sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester,* supra—determined Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall

and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiff's ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 US 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 US 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effecting this opinion.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

AFFIDAVIT OF DAVID H. CLARKE IN SUPPORT OF PLAINTIFFS' MOTION FOR ISSUANCE OF RESTRAINING ORDER

I, David H. Clarke, of the Town of Highlands, County of Monmouth, and State of New Jersey, being duly sworn on oath, depose and say:

1. I am President of each of the Plaintiff corporations, Seacoast Products, Inc. (hereinafter referred to as "Seacoast"), The New Smith Meal Company, Inc. (hereinafter referred to as "Smith Meal"), and Second Oceanic Corporation (hereinafter referred to as "Oceanic").

2. Plaintiff Seacoast is a corporation organized under the laws of the State of Delaware and has a principal place of business at Port Monmouth, in the State of New Jersey. Plaintiff Smith Meal is a corporation organized under the laws of the Commonwealth of Massachusetts and likewise has a principal place of business at Port Monmouth, in the State of New Jersey. Oceanic is a corporation organized under the laws of the State of New York and has a principal place of business at Amagansett, in the State of New York. Plaintiffs Smith Meal and Oceanic are wholly-owned subsidiaries of Plaintiff Seacoast.

3. I am in charge of the operations of Seacoast and its subsidiaries. I was raised in and have spent all of my com-

mercial life in the business of menhaden fishing and processing and am fully familiar with the facts set forth herein.

4. Menhaden is a species of non-edible, migratory fin fish. From January to March, Atlantic menhaden concentrate in offshore waters from Cape Hatteras to Florida. In March they move inshore and begin a northward migration. This migration extends beyond Cape Cod, with the oldest fish traveling the furthest north. In the autumn months they reverse their paths, finishing the return trip and moving offshore by January. This completes their annual cycle.

5. During their summer migration, menhaden remain close to the shorelines. They are estuarine dependent species and thence spend most of their life cycle, with the exception of the annual winter offshore concentration, in coastal areas.

6. Fishing for menhaden is commercially feasible only during their summer migration, when they are close to the shore. During this phase of their cycle, they travel in large, closely packed schools. More than 80% of all menhaden are caught within three miles of shore.

7. Commercial fishing for menhaden is accomplished by using a type of net known as a purse seine which surrounds the school of menhaden and is drawn closely at the bottom traping the fish which are then pumped into refrigerated holds on the boat. The fish are not processed aboard ship.

8. Menhaden is the leading species of fish used for industrial purposes, and the menhaden industry is the largest fishery in the United States. The catch is processed into three products: fish meal, fish oil and fish solubles. Fish meal is used principally for poultry feed, fish solubles in animal feeds, and fish oil is mainly exported to Europe and Canada for use in the maufacture of margarine. Fish meal is

also used by pharmaceutical companies in the manufacture of antibiotics.

9. The business of Seacoast and its subsidiaries constitutes a major segment of the American menhaden industry. The right of the Plaintiffs to fish in Virginia's territorial waters is of great value to them. Menhaden caught in said territorial waters in recent years has had a value substantially in excess of $10,000.00 each year for each plaintiff. In recent years prior to the year 1975, non-resident fishing licenses have been routinely obtained from the State of Virginia. The business and income of Seacoast and its subsidiaries will be lessened in the absence of the catch of menhaden to be taken in Virginia waters during the coming summer months, the fishing season having already commenced.

10. During its 1975 session, the Virginia General Assembly passed special "emergency" legislation, effective March 19, 1975, which is presently embodied in Virginia Code Section 28.1-81.1 and which precludes non-citizens, including corporations ultimately owned by the corporate chain by non-citizen corporations, from obtaining licenses to fish in the territorial waters of the Commonwealth of Virginia.

11. On May 22, 1975, Plaintiff Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Marine Resources Commission, Smith Meal was informed that such licenses were not available to corporations, such as Smith Meal, held directly or indirectly by foreign interests, citing said Virginia Code Section 28.1-81.1.

12. The right of Plaintiffs to follow the schools of menhaden in their progress off the Atlantic Coast, including the right to do so within the territorial waters of the State of Virginia, and the right freely to take or fish for them wherever they may be found, are rights of great value to Plaintiffs, and if they are forbidden to exercise them during the coming summer months, they will sustain great and irreparable injury.

13. It is therefore imperative that Plaintiffs be awarded an immediate restraining order preventing the enforcement of Virginia Code Section 28.1-81.1 until adequate legal steps may be taken to challenge the constitutionality of said statute and to prevent its enforcement prior to a final determination on the merits of its constitutionality.

/s/ David H. Clarke
David H. Clarke

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

AFFIDAVIT OF DAVID H. CLARKE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, David H. Clarke, of the Town of Highlands, County of Monmouth, and State of New Jersey, being duly sworn on oath, depose and say:

1. I am President of each of the Plaintiff corporations, Seacoast Products, Inc. (hereinafter referred to as "Seacoast"), The New Smith Meal Company, Inc. (hereinafter referred to as "Smith Meal"), and Second Oceanic Corporation (hereinafter referred to as "Oceanic").

2. Plaintiff Seacoast is a corporation organized under the laws of the State of Delaware and has a principal place of business at Port Monmouth, in the State of New Jersey. Plaintiff Smith Meal is a corporation organized under the laws of the Commonwealth of Massachusetts and likewise has a principal place of business at Port Monmouth, in the State of New Jersey. Oceanic is a corporation organized under the laws of the State of New York and has a principal place of business at Amagansett, in the State of New York. Plaintiffs Smith Meal and Oceanic are wholly-owned subsidiaries of Plaintiff Seacoast.

3. I am in charge of the operations of Seacoast and its subsidiaries, being raised in and having spent all of my commercial life in the business of menhaden fishing and processing. I am fully familiar with the facts set forth herein.

4. The three largest menhaden fishing companies in the United States, in the order of size, are Zapata Haynie Corporation, Seacoast Products, Inc. and Standard Products, Inc. Unlike Seacoast the other two companies are not alien owned. Also unlike Seacoast, the other two companies both have plants in Virginia and are engaged in fish catching and processing in that State.

5. The business of Seacoast was started in Port Monmouth, New Jersey in 1911 by J. Howard Smith. After his death in the early 1950's, ownership of the business passed to his children and a son-in-law (the "Smith Family"). The business was sold by the Smith Family in December 1973 to a Delaware corporation ultimately controlled by Hanson Trust Limited, a United Kingdom corporation.

6. Prior to the sale to Hanson, the Smith Family had endeavored unsuccessfully for four years to sell Seacoast. Hanson Trust Limited is engaged through various subsidiaries in the business of manufacturing building materials, construction supplies and other industrial equipment and providing industrial and agricultural services as well as services connected with property investment and development. Prior to the purchase of Seacoast, Hanson was not engaged, directly or indirectly, in any aspect of fishing or fish processing or in owning or operating any fleets.

7. In the fall of 1973, Hanson sold two of its United Kingdom subsidiaries to United States corporations (Cummins Engine Co., Inc. and Peabody Galion Corp.) for an aggregate purchase price in excess of $30,000,000.00. Hanson then sought to reinvest these proceeds in the United States economy and requested its American bankers to suggest investment opportunities in this country. One of the American bankers called upon by Hanson was Kuhn Loeb & Co. which was then acting in behalf of the Smith Family in

their efforts to sell Seacoast. After the consummation of the Seacoast sale, Hanson Trust made additional investments in other United States businesses, none of which are related in any way to the fishing industry.

8. Seacoast itself is a United States corporation and its operations should not be confused with the case of foreign fishing fleets not subject to the jurisdiction of the United States. Ultimate alien stock ownership of Seacoast, a Delaware corporation, in no way affects United States control over the corporation as to any laws or regulations the United States has imposed, or may seek to impose, on domestic corporations and/or on the fishing industry as a whole.

9. In addition, the transfer of ownership of Seacoast from the Smith Family resulted in no change in Seacoast's mode of operations. The officers and directors of Seacoast, all of whom are United States citizens, are the same persons who operated the business before the sale. Additionally, the captains and crews of the vessels, numbering about 490 persons, are all United States citizens, and more than 95 percent of the approximately 500 persons employed in plant operations are United States citizens.

10. In connection with the purchase of Seacoast by the British-controlled Delaware corporation, the vessels owned by Seacoast were temporarily transferred to Mr. Richard Reiss, a citizen of the United States. This was done because, under present law, transfer to a foreign-owned corporation of majority control of a United States company operating United States-documented fishing vessels requires the approval of the Maritime Administration of the Department of Commerce. The vessels were transferred to Mr. Reiss to be held by him subject to the outcome of such an application to the Secretary of Commerce.

11. This application was made in January of 1974 by Mr. Reiss pursuant to 46 U.S.C. Sections 808 and 835 for approval by the Secretary of Commerce to the retransfer by Mr. Reiss to Seacoast of 68 vessels owned by Seacoast immediately prior to the sale of the business to the Delaware corporation controlled by Hanson Trust.

12. The Reiss application was forwarded by the Maritime Administration to the National Oceanic and Atmospheric Administration (NOAA) for investigation and comment. In a public statement dated October 16, 1973, NOAA announced its interim policy as to foreign investments in U.S. fishing companies in part as follows:

> NOAA will investigate and evaluate each application on its individual merits with consideration being given to, among other things, the impact of the proposed transaction on (a) conservation and management of the fisheries resources, (b) the employment of United States citizens, (c) United States consumers, (d) competition, and (e) other social and economic factors. In doing this, NOAA will review and evaluate the operational plans of the company as well as the extent of foreign investment in the particular fishery in which the company plans to operate.

13. NOAA scheduled a public hearing on the Reiss application, and comments on the application were solicited by that organization. Notice of the hearing was widely publicized by various means, including the Federal Register. Moreover, the Director of National Marine Fisheres Service wrote to over sixty individuals and organizations involved in the commercial fishing industry, or who might otherwise be interested, advising them of the scheduled hearing and inviting their comments on the application.

14. The public hearing, the first of its nature, was held on March 20-21, 1974 and covered the subjects with which NOAA was particularly concerned as outlined in its interim statement of policy aforesaid. At the outset of the hearings, the Chairman stated (Transcript, Page 8):

> As I previously indicated, the focus of this hearing will be on the fishery aspects of the proposed transfer.
>
> We will further address such considerations as the possible effects of the transfer upon (1) the Menhaden resource involved; (2) the aggregate of fishing/processing companies on whose behalf the transfer is sought; (3) upon the Menhaden segment of the commercial fishing industry and (4) upon consumers of fish meal, fish oil, and fish solubles which these companies have produced.

15. During the hearings, statements were made in support of the application by various representatives of Seacoast and opposing statements were made by its competitors, Zapata Haynie Corporation and Standard Products, Inc. The hearings on the Reiss application to retransfer 68 vessels to Seacoast resulted in a favorable recommendation to the National Marine Fishery Service which in turn made its recommendation to the Maritime Administration. In so doing there was the necessary finding that the application was consistent both with protection of the fisheries, one of the paramount concerns set forth by NOAA, and also with United States social, economic and other interests.

16. The Department of Commerce (through the Administrator of Maritime Administration) granted the Reiss application. The Department is authorized by law, if it grants such approval, to grant same "either absolutely or upon such conditions as the Secretary prescribes." 46 U.S.C. Sec-

tion 839. The approval in point was granted *unconditionally*.

17. Thus, as previously noted, Seacoast and its subsidiaries, the New Smith Meal Company, Inc. and Second Oceanic Corporation, are all United States corporations owned directly by other United States corporations, all paying taxes in this country, subject to all of the maritime and other laws enacted in this nation, employing almost exclusively United States citizens, run by boards of directors and officers, all of whom are United States citizens, processing all of their menhaden catch in this country and marketing all of their products here except for edible fish oil which is precluded from sale by United States laws and which is sold in Europe.

18. Menhaden is a species of non-edible, migratory fin fish. From January to March, Atlantic menhaden concentrate in offshore waters from Cape Hatteras to Florida. In March they move inshore and begin a northward migration. This migration extends beyond Cape Cod, with the oldest fish traveling the furtherest north. In the autumn months they reverse their paths, finishing the return trip and moving offshore by January. This completes their annual cycle.

19. During their summer migration, menhaden remain close to the shorelines. They are estuarine dependent species and thence spend most of their life cycle, with the exception of the annual winter offshore concentration, in coastal areas.

20. Fishing for menhaden is commercially feasible only during their summer migration, when they are close to the shore. During this phase of their cycle, they travel in large, closely-packed schools. My experience has been that the great bulk of the menhaden Plaintiffs have taken over the years have been caught within two miles of the shoreline.

21. Commercial fishing for menhaden is accomplished by using a type of net known as a purse seine which surrounds the school of menhaden and is drawn closely at the bottom trapping the fish which are then pumped into refrigerated holds on the boat. The fish are not processed aboard ship.

22. Menhaden is the leading species of fish used for industrial purposes, and, in terms of landed tonnage, the menhaden industry is the largest fishery in the United States. The catch is processed into three products: fish meal, fish oil and fish solubles. Fish meal is used principally for poultry feed, fish solubles in animal feeds. Fish oil is used domestically for industrial purposes and also is exported to Europe and Canada for use in the manufacture of margarine. Fish meal is also used by pharmaceutical companies in the manufacture of antibiotics.

23. The business of Seacoast and its subsidiaries constitutes a major segment of the American menhaden industry. The right of the Plaintiffs to fish in Virginia's territorial waters is of great value to them. The total tonnage of menhaden caught in said territorial waters in recent years has been substantial, being certainly in excess of $10,000.00 for each of the individual Plaintiffs over the past years, during which years, commercial fishing licenses have been routinely obtained from the State of Virginia. The business and income of Seacoast and its subsidiaries will be materially lessened in the absence of the catch of menhaden to be taken in Virginia waters.

24. Late in the year 1974, the Honorable Thomas N. Downing of Virginia introduced House Bill 17048 to prevent American-registered vessels from fishing in U.S. waters if such vessels are owned by a corporation controlled directly or indirectly by foreign interests. This bill was not enacted.

Mr. Downing reintroduced his proposed legislation on March 11, 1975 in House Bill 4612, which, unlike its predecessor, contained a "grandfather clause" excluding from its application U.S. registered vessels owned by the prohibited corporations if such U.S. registration existed at the time of the passage of the proposed legislation. The new bill also has not been enacted.

25. Your affiant is informed and believes and therefore avers that during its 1975 session, the Virginia General Assembly passed special "emergency" legislation, effective March 19, 1975, which is presently embodied in Virginia Code Section 28.1-81.1 and which precludes non-citizens, including corporations ultimately owned or controlled by non-citizen corporations, from obtaining licenses to fish in the territorial waters of the Commonwealth of Virginia. The Virginia law prohibits Seacoast from fishing in Virginia waters although Federal law imposes no such bar.

26. On May 22, 1975, Plaintiff Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Marine Resources Commission, Smith Meal was informed that such licenses were not available to corporations, such as Smith Meal, held directly or indirectly by foreign interests, citing said Virginia Code Section 28.1-81.1.

27. In addition to the foregoing, plaintiffs separately contest in this action another Virginia statute which has been in force for a number of years, (presently embodied in portions of Virginia Code 28.1-60(3)), prohibiting non-resident fishermen, individual and corporate, from fishing for menhaden within the confines of Chesapeake Bay,

west of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting same into oil, fish scrap, fish meal or guano. Plaintiffs contend they are thereby wrongfully prevented from fishing for menhaden in Chesapeake Bay which is the most productive source for the catch of menhaden in Virginia waters.

28. The right of Plaintiffs to follow the schools of menhaden in their progress off the Atlantic Coast, including the right to do so within Chesapeake Bay and the other territorial waters of the State of Virginia, and the right freely to take or fish for them wherever they may be found, are rights of great value to Plaintiffs, and if they are forbidden to exercise them, they will sustain great and irreparable damages.

29. I know of no disputed issue of fact to be tried, and I know of no defense to this action. I, therefore, respectfully submit that Summary Judgment for Plaintiffs should be entered herein and that Defendant should be enjoined from enforcing said statutes as prayed and this Honorable Court should grant such other relief as may be just.

/s/ David H. Clarke
David H. Clarke

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

STIPULATIONS STATED BY COUNSEL IN OPEN COURT

Norfolk, Virginia
October 15, 1975

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* * *

[2] Mr. Moore: Your Honor, I think we can state for the record—and Mr. Willcox can correct me if I'm wrong —that:

Mr. C. H. Crockett, who is a boat captain and patrols the offshore waters of Virginia in the three-mile limit, would testify that in the 1974 fishing season, the only season in which he has been employed with the Commission, which would be relevant to this proceeding, that he did not see the Seacoast fishing vessels operating in Virginia waters for purposes of fishing.

We would have testimony from Mr. William M. Sklar,—S-k-l-a-r—who is a fish spotter for Zapata Haynie Corporation, who has been a fish spotter for 10 years with Zapata and eight years previously with another company. He would testify that he is fully able to recognize the various boats of different companies and he has during the last three seasons seen no fishing by vessels owned by Smith and Company or Seacoast. He would also testify that in years past,

running back for eight to 10 years, I believe he said, that there has been substantially little or no fishing by [3] Smith and Company or Seacoast.

Mr. George T. Edwards, also a fish spotter for Zapata Haynie for eight years, and eight years previously with another company, would indicate that he has in the past three seasons seen Seacoast vessels only rarely in Virginia waters engaged in fishing, but that in years past, perhaps 15 years past, Smith and Company, now Seacoast, did engage in some fishing of a substantial nature in Virginia waters.

Is that—

Judge Bryan: Thank you, Mr. Moore.
Mr. Willcox.

Mr. Willcox: I would like to add to that, your Honor, that both Mr. Sklar and Mr. Edwards are employees of Zapata Haynie Corporation, which is mentioned in the affidavits and briefs; that Mr. Edwards, I believe, would testify that the quantity of menhaden fish available in Virginia waters has dropped significantly in the last three or four years and is continuing to drop, and I believe he said that was true generally of the Atlantic Coast fisheries, save for the Southport, North Carolina area, which this year experienced some increase. They would—

Judge MacKenzie: Is that quantity, you said, quantity of fish?

[4] Mr. Willcox: Quantity, yes, sir, of menhaden fish.

I believe that they would also verify, for what it's worth, your Honor, that the men, the Captains and crews of the plaintiffs' boats, are largely Virginians resident in the Reedville area, and I believe that two of these gentlemen, Mr. Crockett and Mr. Edwards, formerly worked for the plaintiffs in the menhaden fishery themselves.

May I have just a moment?

Judge Bryan: Yes.

Mr. Willcox: May it please the Court, we have one further stipulation, bearing on the same subject matter, which is that Mr. Clarke, if asked, would testify that a full boatload of fish, average boat size, on today's market is worth about $80,000 and that even with the refrigerated equipment available on the boats today that menhaden would begin to deteriorate, begin to spoil, after about a week.

Judge Bryan: All right, sir.
Mr. Moore, do you have any disagreement with that?

Mr. Moore: We would agree that he would testify to that; yes, sir.

Judge Bryan: All right.

Mr. Moore: We would like, for the purposes of the information of the Court, to clarify that Mr. Dougles, the [5] defendant, is Chairman of the United States Marine Fisheries Conference, and that weighs upon his inability to be here, your Honor.

Judge Bryan: There is no question that as much as $10,000 and more is involved in this case, is there?

Mr. Willcox: I don't think so, your Honor.

Mr. Moore: No, sir.

This is with regard to the appropriateness of an injunctive relief. That's why we intended to introduce this evidence.

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

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DEPOSITIONS UPON ORAL EXAMINATION OF JAMES E. DOUGLAS, JR. AND W. JACKSON DAVIS, TAKEN OF BEHALF OF THE DEFENDANT

Newport News, Virginia

October 27, 1975

Appearances:

Willcox, Savage, Lawrence, Dickson & Spindle

By: Thomas H. Willcox, Jr., Esquire
James C. Howell, Esquire
Counsel for the Plaintiffs

James E. Moore, Esquire
Assistant Attorney General
Counsel for the Defendant

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[2] Depositions upon oral examination of James E. Douglas, Jr. and W. Jackson Davis, taken for de bene esse purposes on behalf of the defendant, before Richard W. Zahn, CSR, a Notary Public for the Commonwealth of Virginia at Large, taken pursuant to agreement of counsel, commencing at 2:00 P.M. on the 27th day of October, 1975, at the offices of the Virginia Marine Resources Commission, Newport News, Virginia; and these in accordance with the Federal Rules of Civil Procedure.

JAMES E. DOUGLAS, JR., a defendant, was sworn and deposed on behalf of the defendant, as follows:

Direct Examination

By Mr. Moore:

Q Mr. Douglas, what is your position with the Commonwealth? A I am Commissioner and Chairman of the Marine Resources Commission.

Q And as Commissioner, you are responsible for the conservation and management of the fisheries of the Commonwealth? A Yes. Marine fisheries of the Commonwealth, I should say, as distinguished from upland fisheries.

Q Which, if any, other boards and commissions relative to fisheries and conservation fisheries do you participate on and serve on? [3] A Commissioner of Potomac River Fisheries Commission, which is a joint regulatory fisheries in the Potomac and Maryland. Commissioner and past

Chairman of the Atlantic States Fisheries Commission, which is a 15-state interstate fisheries compact on the East Coast. And that would be all dealing with domestic fisheries.

I am an alternate Commissioner to the International Commission Northwest Atlantic Fisheries, which is an 18-nation international fisheries convention to which the United States is a party, managing fisheries off the northwest Atlantic, which gets me confused, but northwest Atlantic is off the East Coast of the United States.

Q Have you served as a technical adviser to any United States treaty delegations dealing with fisheries treatises? A Yes. Specifically, one of the Soviet-United States bilateral negotiations—I forget the date, but they were held in Moscow some two or three years ago. I also served as an adviser to the State Department relative to the fisheries matters.

Q Prior to the enactment of Section 28.1-81(1), this was enacted, I believe, by the 1975 General Assembly. What are the requirements for obtaining commercial fishing licenses in Virginia by corporations? A Well, where a corporation was permitted a license basically, the only requirement was that they be—there was a [4] residency requirement, both in terms of the residency versus nonresidency interest in the corporation, and whether the corporation was in fact a Virginia corporation.

Q And would that— A That varies from license to license, you understand. But as a general statement, unless you want a specific license, that is generally true.

Q Would it be fair to say then, as a general statement, in order for a corporation to obtain commercial fishing licenses in Virginia, it need be a resident Virginia corporation, that being a corporation organized under the laws of Virginia? A Yes. I think as a general statement.

Q All right, sir. In the passage of Section 28.1-81.1, which precludes aliens from obtaining commercial fishing licenses, was the grandfather clause aspect considered by the Legislature, or by the committee?

Mr. Willcox: I object to that. This is hearsay unless we limit ourselves to what this particular witness himself did or said. Certainly he is not competent to tell us, nor would it be proper evidence as to the deliberations of the committee.

Mr. Moore: We will withdraw that question and begin again.

[5] By Mr. Moore:

Q During your appearances before committees of the General Assembly, with regard to this specific bill, 28.1-81.1, were you asked questions regarding what, if any, present fishery companies operating in Virginia would be affected by this legislation? A Yes. I recall distinctly that that question was asked, what effect, and what companies it would affect. I can recall at that time advising, I believe it was the Senate committee, but I wouldn't want to be certain on that, that to the best of my knowledge, the provisions of this bill would affect only one firm that had previously been doing some fishing in Virginia. But it would preclude the type of fishing that they had previously been doing.

Q All right, sir. What company was that? A I don't believe we indicated the company at the time, but it would be the Seacoast, the Old Smith Meal menhaden firm which was sold to some British interests.

Q Were you asked at the time of your testimony before these General Assembly committees, were you asked whether

or not that company which would be affected was engaged in a substantial amount of fishery activity in Virginia waters? A I think there was some reference to it. Of course, at that time this firm would have been limited anyway, because of it being a nonresident, to offshore of a line drawn between Cape [6] Charles and Cape Henry. And they had, when it was Smith Meal, had a license on some handful of vessels, three, four, five, six—I don't have the exact data before me now—to fish in that three-mile limit which was provided for by Virginia law.

Q Are you familiar with National Marine Fisheries Service statistics for the period from 1972 to 1973, which would show Virginia landings of certain species taken off the Virginia coast? A Yes.

Q Now, you can refer to those statistics if you like, A It is published information on the Department of Commerce.

Q I ask you to refer to those statistics in front of you. With regard first to the—well, first of all, indicate to us the four species that were contained in that series of statistics which are taken in offshore waters from the Virginia coast. What four species? A The four species, and where I am reading them, as I know you and Mr. Willcox are aware, is previous statement of testimony before a Congressional committee concerning other bills. They were referring here to river herring, scup, sea bass, and butterfish.

Q All right, sir. Why were these four species selected for your presentation before Congress? A Well, they represent four species that are very important to Virginia fishermen. They represent species that [7] indeed range out beyond our territorial waters, and are subject to foreign fishing effort.

Q What foreign fishing effort? What type foreign fishing effort do you speak of? A Foreign fishing effort by primarily, during these years, primarily Soviet fishing vessels and Polish fishing vessels, although many other nations were involved, I am positive, during those years, including Spanish, Japanese, the German Democratic Republic, East Germans, as we call them, West Germany, F.R.G. Almost all of the nations that are fishing, that might be fishing under the ICNWF, which, incidentally, is the alphabetical nomenclature of International Commission Northwestern Fisheries, if you will allow me to use ICNWF. Almost all the vessels fish in this area known as statistical area 5 and 6 under ICNWF. All of the countries I mentioned have vessels in the area, and primarily, though I would say that the major effort came on the part of Soviets, Poles, and of late, German Democratic Republic.

Q Is it fair to say those four species, river herring, scup, butterfish and sea bass, are all species caught in the waters off Virginia's coast, but in the waters outside the exclusive fishery zone of the United States, and therefore are subject to foreign fishing? A Yes. Both in and out of that 12-mile zone.

Q All right, sir. Turning your attention now to [8] statistics on river herring, what—

Mr. Willcox: May I ask, so I will understand what he is saying, are these statistics only applicable to fish caught beyond the 12-mile limit?

The Deponent: No, sir. Let me explain. These will be total landings in Virginia. Now, I will say to you that it doesn't necessarily mean that Virginians landed them all, though most landings in Virginia are by Virginia fishermen. But it is tonnage of these species that are landed in Virginia

ports. They may or may not have been caught in or outside of the 12-mile zone. The Department of Commerce figures do break this down by area in which this thing is caught, if you are interested in that. I don't have that right in front of me, but all of these species are subject to being taken, clearly subject to being taken beyond 12 miles, which is the contiguous fishery zone where the United States exercises exclusive fishery control.

Mr. Willcox: And is it possible to tell whether they are caught within or without the three-mile limit?

The Deponent: I don't know whether the statistics break that down or not, Mr. Willcox, but I can find that out. My statistician can tell me. I am pretty positive it breaks it down by the 12-mile limit. It does have a geographical breakdown, if you need that.

[9] Mr. Willcox: But the figures you are going to give us are merely the number of tons of fish that came to Virginia ports, no matter who they were caught by nor where they were caught?

The Deponent: They would have been caught by some domestic fishermen.

Mr. Willcox: But they might have been caught off North Carolina, or Maryland, as well as off Virginia?

The Deponent: That is correct.

By Mr. Moore:

Q Pursuing Mr. Willcox's point a little further, do Virginia landings substantially indicate Virginia-based fishing operations? Are most landings in Virginia by fishermen who caught fish off Virginia waters? A Oh, yes. I think I could say that unhesitatingly, simply because of the nature of the fishing vessel and its abilities, or inabilities to range very

far. I don't think there is any question generally about that. There are some Carolinians, for example, that land in Hampton Roads ports. I am sure there must be some Marylanders that land in Chincoteague ports. By the same token, I am sure there are some Virginians landing in North Carolina, and there are some Virginians that are landing in Maryland. I don't know whether it washes itself out, you know, how accurate or important that is to you to zero in on this specifically. You asked about Virginian vessels. We do have [10] statistics on the number of vessels that are landed, and the number of trips, and so forth, of vessels that land in Virginia. I don't have it broken down by state.

Q Turning your attention now to the statistics, National Marine Fisheries statistics. With regard to river herring landed in Virginia for the period 1973 through 1972, can you indicate from those statistics what the average yearly landing in terms of pounds of river herring was? A Yes. The 10-year average was 24.8 million pounds.

Q Do you have there statistics which indicate the 1973 landings in terms of percentages of the average 10-year landing? A Yes. The 1973 landings were 9.2 million, which, by my calculation, shows that to be 37 percent of the 10-year average.

Q Do you consider that to be a significant decrease? A Absolutely.

Q I turn your attention now to the species scup. Same statistics. Are these caught in waters off Virginia's coast also? A Yes, sir.

Q All right, sir. A The 10-year average, '63 to '73 on scup is 5 million pounds. The '73, 1973 landings, 825,000. That represents 16 percent of the 10-year average. '73 landings are [11] 16 percent of the previous 10-year average.

Q That is then an 84 percent decrease? A Yes.

Q In 1973, as compared— A From the 10-year average.

Q From the 10-year average. All right.

I turn your attention now to sea bass, and the same comparison, if you can make that. A All right. In sea bass, the 10-year average, same years, '73, '72, 2.2 million pounds. In 1973, it was only 1.2 million pounds, and that translates itself into being only 57 percent of the previous 10-year average, or 43 percent decrease.

Q And finally, the butterfish. A The 10-year average on butterfish is almost 1.3. Perhaps I should say 1.29. In 1973, it was 199,000 pounds, and that would represent only 15 percent of the previous 10-year average, or an 85 percent decline.

Q Would you think it fair to say then that these four species have suffered substantial decreases in their availability for catch? A Yes, based on those percentage decreases.

Q Has there been in recent years any significant decrease in the total fishing effort offshore in Virginia which might account for these substantial decreases? A To the best of my knowledge, bearing in mind that [12] the state does not license, does not require a license of a vessel to fish outside of its territorial seas, so we don't have absolute statistics. To the best of my knowledge, the offshore trawl fleet in Virginia is probably slightly less today than it was say 10 years ago.

However, I don't have any hesitation any way in saying to you that that decrease in fishing vessels could possibly account for that decrease in landings over catch.

Q It would, or would not? A It could not if the landings and the catch were synonymous. Something other than just the fact that we have a few vessels going out there is, in my opinion, obviously has to bear some of the blame.

Q Now, turning your attention to these four species, river herring, scup, butterfish and sea bass, are these species which are either intentionally or unintentionally taken by foreign fishing fleets fishing in offshore waters? A Let me take them in another order. In the instance of scup, we have some evidence by virtue of discussion with National Marine Fisheries people, and overflights, boardings of foreign vessels by Federal people, Coast Guard, National Fisheries Service, that in the late '60's, I would say, some Soviet vessels did venture down South in our area for scup directly. We then have further evidence, based again on the same sampling and approach, as I just mentioned, of boardings, [13] overflights and so forth, that as the foreign fishing fleet came into this area more concerned with silver hake, sea herring, and mackerel, that they began taking river herring, sea bass, butterfish, as well as scup, incidental to the catch of these other directed species.

We have an indication that once they got a lot of river herring as a by-catch, and that they subsequently seemed to direct an effort on river herring. I can only have a supposition they found out something to do with it.

Q When would this directed fishing on river herring by foreign fishing fleets have become, if you know? A We think it occurred approximately 1970, and that is obviously when the landings decreased also. But there are other factors involved, and Dr. Davis also can corroborate this, because the National Marine Fisheries Service man for this area is located at VIMS, and they keep extensive records on this.

But, let me go on and say, lest someone misunderstand when I talk about an incidental catch, or a by-catch of a directed fishery, like a directed fishery on mackerel, catching river herring or scup, the effort, fishing effort of foreign fishing, large foreign fishing fleets like the Soviets and Poles can merely, as a by-catch, catch greater tonnage of some of these by-catch species than the entire United States fishery directed to those species. That, I think, is a fact that can be borne out by ICNWF statistics, and State Department and Department of [14] Commerce fisheries. We are not talking about something incidental in its impact on the domestic fishermen. Let me make that plain.

Q Let me ask you again. When, and I am not sure we got this in the record. Approximately what period in time would you pinpoint as the time when there was an increased or directed effort by foreign interests at fishing by river herring? A We believe that occurred right in the late '60's and early '70's. Around 1969, '70.

Q Referring to National Marine Fisheries statistics, during what period of time is there shown the most dramatic decrease in landings of river herring?

From Virginia waters, or off the coast of Virginia waters? A Well, just running down it beginning in 1973 and continuing, it was 26 million, 26.6 million. 26.2. 28.5. 28.1. 32.3.

In 1969, 30.4.

In 1970, 19 million.

1971, 10.2.

1972, 10.4.

1973, 9.2.

So the decrease occurs between 1969 and '71, which statistically, we feel there is a correlation between those sta-

tistics and when the boardings, at least the reports back to [15] us that the boardings showed they were directing some effort on river herring.

Q Are you familiar with the term pulse fishing? A Yes.

Q What does that mean? A It is a term applied basically to how the foreign fishing effort goes. Where there is a very concentrated effort in a certain area until the stocks in that area are fished to the point where it is economically unfeasible, and you move on immediately.

Q I see. Does this pulse fishing have an ill effect upon fishery resources? A Well, if it is large enough, obviously, and we think the foreign fishing effort is, yes. It is not what most good conservationists would like to see, simply because it is, by its definition, a depleting of a given area at a given time.

Q You indicated previously that you have been technical adviser to United States delegations involved in treaty making regarding fisheries. Based upon your experience as a technical adviser, in your experience in fisheries management, is it your opinion that agreements, treaties and conservation measures in international waters have been successful in curbing pulse fishing practices and other predatory practices by foreign interests? A Well, first of all, it has not curbed pulse [16] fishing. It hasn't addressed itself to pulse fishing, first. However, it does address itself to the overall conservation of the resource, or the particular stocks in question. And the answer is that they have not been successful, at least based upon the assessment of the resulting stocks of those species they have purported to protect, they have not done so. The international agreements have not protected them. I think this is primarily because of

two reasons. First of all, we found—we, in this instance being the United States, have found it very difficult to achieve agreement as to the appropriate measures for conservation of a stock or biomass with the foreign nation or nations, whichever we might be dealing with.

Secondly, where we do get some agreement, it has been very difficult to enforce, in our experience—and again, I say that in terms of the United States—has been that these nations—well, there have been numerous instances of violations of the agreement. These are cited chapter and verse by the Coast Guard. I don't have them before us here today. They involve falsification of log records of catch. They involve using gear that was improper in the area. They involve being in an area when they are not supposed to be in the area, and they more seriously involve just overfishing the quotas that might have been established.

Q Now, these violations of treaties and regulations and so forth that you speak of; are these violations that have [17] been discovered of foreign interests, foreign fishing vessels? A Yes. All of them are foreign fishing vessels.

Q Now, the American fishing industry operates on an overnight sort of operation; is that correct? Would you explain that term, if it is accurate? A Yes. I guess it is a comparison to the foreign fishing effort that we are talking about. The American vessels are very small, most of them well under 150 feet, and they go out and come back in 24 or 48 hours. Although they are capable of perhaps staying out a week or 10 days, something like that, it is generally not the practice to do so. It depends a little bit on what species you are going over.

Scallops, for example, where you process them on board, you can stay out a little longer. Most of the fin fishing, which is what we are dealing with in these international

agreements, the American effort on those fisheries, on those stocks, is characterized by in and out daily trips, if you want to call it that, overnight trips, whereas the foreign fishing effort is characterized by very large intense trawl boats and motor ships, factory ships, that stand by and take their catch and they stay in the area months on end. They even—they rotate their crews literally by air, keeping the vessels in the area.

Q You referred to motor ships or manufacturing ships. What is the purpose of those that the foreign interests have? [18] A To take the catch from the slightly smaller catching vessels and be able to process it, and I assume make it more economical for them to fish and maintain a very distant water fishery. Bearing in mind, of course, that the fish we are talking about in these international agreements, again, are in the northwest Atlantic, which is off of the northeast coast of the United States. They are the fish—they are the stocks and fish that have historically supported Canadian and United States fishermen, for example, and, you know, if you are coming from the Soviet Union, or England, or Spain, or anywhere, you have a different logistic problem coming to get these fish than we have to come get them. We being the Americans.

Q Then is it your testimony that generally speaking, American fishing industry, American-based fishing industry does not employ the use of manufacturing ships for offshore manufacturing? A I don't believe that there is a single mother ship, manufacturing ship in the American fishery.

Q Is it fair to say then that the American fishery is dependent upon its own waters and the waters close to the United States for the taking of fish? A In the northwest Atlantic, on the northeast, and East Coast, yes.

Q Prior to the enactment of Section 28.1-81, was there anything to your knowledge in Virginia law which would [19] prevent totally a foreign-owned corporation from establishing a corporate structure in Virginia and fishing in Virginia waters within the three-mile limit? A No, sir, other than the residency requirements. If he could otherwise meet the provisions of law, there was nothing that dealt with foreign ownership.

Q In terms of stock ownership? A Right.

Q Turning your attention now to menhaden fishing in the Chesapeake Bay, you are familiar with the provisions of Section 28.1-60(3)? A I will be in just a moment.

Q Yes. A Nonresidents.

Q What is the general purport of that provision? What does that do in terms of restriction, restricting who can fish in the Bay? A Okay. Generally speaking, that section limits fishing in the Chesapeake Bay, which is delineated by a line drawn from Cape Charles to Cape Henry, really. It limits fishing in the Bay to resident corporations. It does permit nonresident corporations, or nonresidents, let me put it that way, to fish eastward of that line in the Atlantic Ocean, the three-mile limit for a limited period of time. I mean, for a season. I shouldn't say for a limited period of time. For a [20] specific season.

Q Is that a new statutory provision, or one that you have been familiar with since you have taken your position? A Good heavens, no. That has been on there for a long time.

Q Do you have any recollection as to what date of its enactment would be? A No, I don't. But it is a number of years. I looked it up the other day, and forgot.

Q All right, sir. Are the amounts of dollars, money taken in from licensing activities by your Commission sufficient to support the activities of the Virginia Marine Resources Commission? A Oh, heavens, no.

Q Is the Commission active in the management and conservation of fishery resources in Virginia? A We certainly think so.

Q And what agency do you rely upon for technical and scientific advice regarding fisheries conservation? A Virginia Institute of Marine Science.

Q Are any of the license fees collected by your Commission directed towards support of the activities of the Virginia Institute of Marine Science? A Well, not directly. The license, fishing licenses are a general fund revenue to the extent that they go into the [21] total treasury of the state and are reappropriated. But they represent a very minor amount of money alongside of other revenues.

Q But your agency, the Marine Resources Commission, does receive general appropriations from the General Assembly and is not self-supported by licenses? A Right. And those general appropriations far exceed what license revenues we generate in this state.

Q Is it your position as Commissioner of Marine Resources, or what position would you take as Commissioner of Marine Resources regarding the possibility of foreign fishing interests becoming active in Virginia waters? A Well, okay. You are asking me for my personal feeling regarding that?

Q In your capacity as Commissioner? A Right. I would say that having served on the various international groups that you have previously identified, having seen

those statistics and having discussed these matters with people at the State Department, Department of Commerce, that indeed there is a difference in fishing philosophy of the foreign nationals that are now fishing off our Coast. We have referred—we have previously referred to those fisheries being in our waters, and they are the stocks on which the American fisherman has historically relied and had his livelihood. Incidentally, we believe has had—that makes the American [22] fishermen have a kind of vested interest in the conservation and preservation of those stocks. We haven't seen that same kind of philosophy on the part of the foreign nations. It varies from nation to nation. There is no question about that. But as a whole, we haven't seen that.

I would not want, certainly would not want to see that kind of philosophy come into and be a part of Virginia fisheries, fisheries on which the Virginia fisherman has historically relied, and of great importance is what we would call our internal waters, mainly the Chesapeake Bay, which is a very unique resource.

Q Is it your view that the purpose of enacting Section 28.1-81(1) was to preclude foreign interests from entering Virginia waters and using the resource? A Well, it certainly precludes them from—yes, from using the loophole of the corporate shield of coming in and using these fisheries. Again, I can't say as to why the General Assembly passed it. I think this is certainly one cogent argument, and one I would certainly use if it were up to me.

Mr. Moore: That is all I have.

Cross-Examination

By Mr. Willcox:

Q Mr. Douglas, you did not propose that bill; did you? [23] A No, sir.

Q What is your personal professional background? A Prior to coming here?

Q Yes. I mean, are you a marine biologist, economist, or what? A I am closest to an economist, I guess you would say, a businessman.

Q How long have you had this job? A It will be five years in July, next July. What is that, four and a half years?

Q And so that in terms of the scientific end of fish resource management, that is not your personal field of expertise? A It is now. It wasn't when I came here.

Q All right, sir. Now, the four fish that you spoke about that you had statistics on are largely caught beyond the 12-mile limit; aren't they? A I would say so, yes, sir. But that again, if you would like, we can get you a breakdown on that.

Q I am satisfied with it if you agree with me generally. Certainly not within the three-mile limit? A Some are, but principally, no. Principally, no.

Q Isn't it true there is really very little commercial fishing for anything except menhaden within the three-mile limit? A Oh, no, sir. One species is an anadromous species [24] that we mentioned, and that would be river herring, and river herring has been a substantial fishery in the Chesapeake Bay which has declined to practically, in the last—well, they are beginning to revive, but the last five years has been zero.

Q If you attribute that decline to the foreign fisheries operated in U.S. waters, you are attributing it to the activities of the foreign fishermen beyond the 12-mile limit? A That is correct.

Q Can you explain to me what in the new statute would in any way improve that situation if the bad result is attributable to activities beyond the 12-mile limit? A Well, I think the answer there is that the Virginia statute obviously doesn't apply beyond the three-mile limit. No question about that.

Q So nothing in the Virginia statute can change what is now being done beyond the 12-mile limit? A That is correct.

Q And if the activities beyond the 12-mile limit are what are causing you trouble, this statute isn't going to help you? A Not to reverse what is occurring, as you have correctly said, beyond the 12-mile limit, and affecting our landings.

Q And United States law prevents foreign nationals from fishing within the 12-mile limit at this time? [25] A Basically, yes.

Q And you are engaged with others in your field in an effort to extend the United States limit from 12 to 200? A Yes. We are on record as being in favor of that.

Q And if you are successful, then foreign vessels will be kept beyond the 200-mile limit? A No, sir, not necessarily.

Q They would be controlled within the 200-mile limit? A Yes, sir.

Q Are these four fish migratory fish? A The four that I mentioned?

Q Yes. A I would say yes, but your next witness is more capable of answering that question than I am as to the biologic nature of those four fish.

Q Assuming for the sake of argument that Virginia had the power to regulate fisheries for 200 miles offshore, could you affect significantly fish stocks by unilateral action of the State of Virginia which was not matched by states on either side? A I don't know how to answer that. You could, and yet, obviously, it wouldn't be as effective as if you had collateral-type regulations by other states.

Q You will concede that to work the seaboard, you have to work it all together? A I would concede that would be the most desirable [26] if you wanted to regulate certain stocks, or the biomass, yes.

Q There would be very little means of keeping fish within the prolongation of the northern line of Virginia and the southern line of Virginia, and keep them out of areas north and south of that; would there not? A Wait a minute. I don't follow that one.

Q You couldn't build a fence? A Oh, no.

Q Constituting the northern boundary of Virginia water and the southern boundary of Virginia water, and keep fish within it? A No. I think the only thing you could do, and I am sure you know this, would be to somehow regulate, if the states were even given the authority to regulate in this hopeful new area, would be to limit the effort somehow in the waters that might control us, and I guess your point is that if Maryland doesn't limit it, then have we accomplished anything by limiting it in Virginia. My answer is, yes, we have accomplished something, but, obviously, it would be better if all states, or if there were a uniform action throughout the range of that species. I don't think there is any question about that.

Q Would you also agree with me your attempts to keep foreign vessels out of Virginia's three-mile limits have no

practical effect, because there aren't any foreign vessels in there, and cannot be under current United States law? [27] A Well, I don't think you prefaced that with a correct statement. By the definition of the new law, there were vessels fishing that would be precluded, which we have stated were namely the vessels, menhaden vessels of Seacoast.

Q And Seacoast Properties is a— A But, obviously, the Virginia law does not deal with the foreign national vessels which are now beyond the 12 miles. And as I understand that law, all we would be dealing with would be the ability of any foreign interest coming in, and I think they would have to purchase Virginia, or not Virginia, but U.S. vessels, because even the Soviets can't enroll their trawler in the U.S. fishery at this time. So it would be an investment in vessels that were already enrolled in the United States fishery.

Q Mr. Douglas, in your official capacity as official spokesman for Virginia, and an expert in your field, are you testifying that you believe this new statute will have any beneficial effect on the fisheries in Virginia or the United States? A Well, first of all, it wasn't designed to. I can't believe it was designed to attack the United States problem. I think you and I both would concede that.

Q It was designed by counsel for Zapata-Haynie Corporation; was it not? A That I cannot testify.

[28] Q Wasn't Mr. Dunton in here five minutes ago reviewing it with you, just before you testified? A Mr. Dunton has reviewed it with me on several occasions.

Q Isn't he general counsel for Zapata-Haynie? A I don't know whether he is general counsel, but he does represent—

Q It is through his efforts this bill was presented to the Assembly; was it not? A Senator Mann presented the bill. Mr. Dunton was there testifying on behalf of it.

Q Well, answer me if you know. Was it not Mr. Dunton who got Senator Mann to introduce the bill? If you don't know, say so. A I would say I believe he did, but I can't testify to that.

Q And the net effect of the bill is, so far to date, the only result of it has been to keep Seacoast from fishing off the shores of Virginia? A To the best of my knowledge, that is the only firm that has been affected at this time.

Q So it has not been a problem with foreign interests trying to acquire U.S. corporations so they can fish within your three-mile limit? A No, sir. This is the only instance I know of.

[29] Q And the three-mile limit, sir, what gives you the right to patrol the first three miles of your coastline? What law, if you know? A I don't know. I can't cite you the law. It is my understanding that this right was given to the states by the Federal Government, and that it is not uniform, that Texas or some other state has a territorial sea of slightly more than this.

Q And is it not true if a foreign interest purchased a United States corporation, that before those U.S. registered vessels could be registered, or continue in service, they would have to obtain the approval of the United States Department of Commerce? A I believe that is correct. I am not familiar with that process to that degree, but I believe that is correct.

Q Did you join with the representatives of Zapata-Haynie in opposing the relicensing of these vessels in Seacoast Properties after it was acquired by the United Kingdom interest? A The re-enrolling of those vessels and documentation of those vessels in United States fisheries? Did we inject ourselves into that decision? We did not.

Q But you know in fact that did occur. There was a hearing, and they were relicensed, or redocumented by the permission of the United States Department of Commerce. A I know. Yes, I know they are documented. I do not know about a hearing, or who was there, or what was said. We [30] just don't know that.

Q Assuming for the sake of discussion that the United States law would require that vessels carrying the United States documentation, whose corporate ownership changed to foreign nationals, would have to get them redocumented after a hearing, would that not give you adequate opportunity to complain if you felt that that particular Virginia, or United States corporation was thereafter going to change its fishing practices to your detriment? A That certainly provides an opportunity. Whether or not it would be an adequate opportunity, that is objective. I guess I would testify that I don't find many adequate opportunities in the Federal scheme of things, under any circumstances.

It is my understanding, and quite honestly, Mr. Willcox, my knowledge of this comes from listening to testimony on a Federal bill approaching the same problem when certain fishing interests were complaining about this very process. However, the Federal Government may or may not hold a hearing on the matter.

Q All right. A So whether you consider that adequate, I don't know. I don't really—not having ever tried to involve myself in that, I just don't know what we would run into.

Q Can you tell me why a bill was passed, or did you [31] support in the Virginia Assembly this bill to be passed as emergency legislation? A We supported the bill. I don't recall that there was any testimony or any question of me as to why it may, or why it did carry an emergency clause.

Q Were you then aware of any effort by any foreign interests to acquire any domestic corporation which would have fished in your waters but for this bill? A At that time, the time the bill was proposed, I don't believe there was any foreign interests trying to acquire an interest in vessels that might fish in Virginia waters. The Seacoast Products people, or Smith Meal people, had sold out to what we understood was a British interest. And again, like I said, we indicated to the Senate that this company would undoubtedly be affected if our information was correct.

Q And that had occurred several years prior? A I think so, but I don't know what the date of this was.

Q And you issued nonresident licenses for their vessels for a number of years before the 1975 legislation? A We issued them one year, I know, and one year when they asked for them, there was a problem of the vessels being deemed to be, I think, New Jersey vessels, and the licensing fee was therefore very steep. I don't believe any vessels were ever licensed. But, yes, vessels from that company under its current—[32] I really don't know what their current ownership is. I only assume under their current ownership they have been licensed by the Commonwealth, yes, prior to the passing of this act.

Q The menhaden fishing season is from early May to when, late August? A It goes up into December.

Q It begins in early May? A It begins, oh, what is it, the first of May, first Monday in May.

Q Something like that? A Yes. Unless you want it direct, but it goes to December.

Q Since you are knowledgeable in Virginia practices, a law passed by the General Assembly of Virginia normally becomes law as of July 1; does it not? A Or June 1, if it is in the short session.

Q All right. A I will concede it not being emergency legislation it is conceivable that vessels from the only company affected could have been licensed for that forthcoming season prior to the effective date of the act.

Q Can you think of any other reason it was made emergency legislation but to bar that particular company from obtaining a menhaden license for the coming year? A I can't testify for the reason of emergency [33] legislation per se. As you mentioned, it wasn't my bill.

Q Can you think of any other reason, any other factor that would have had anything to do with it but that? A Let me just say this, Mr. Willcox. You press me on this issue, but whatever merits anyone may have thought that bill had, there may also be reasons for imposing those merits at an earlier date. Okay. So I just cannot really answer that.

Q But you are not aware of any situation anywhere that was affected by the bill, or has been affected by the bill but the one menhaden fisherman, Seacoast Products Corporation? A Well, again, you are attempting to trap me on an item.

Q I am not attempting to trap you. Have you turned down any license for anybody except Seacoast Products?

A No, sir. No. I just don't know, you know, what the effect was other than it is obvious when you put emergency legislation in, it becomes effective upon signature, versus June 1, and it is true that the opening date of the season fell before June 1. And if you want to draw your conclusions from that, I can draw the same conclusions you can. But I didn't put that bill in. I didn't put that emergency clause on it, and I don't recall that we were asked a single question concerning the emergency clause. You know, we just never addressed it.

Q In your various participations in various professional organizations seeking to extend the 12-mile limit, [34] has there been any consideration that doing that would do no good, because all these foreign interests can sneak in and buy existing U.S. companies and evade the law? A Yes. That has been posed to certain Congressmen and Senators as being a possible loophole, and I believe there was, and perhaps still is, a bill in Congress to address that very point.

Q On a national basis? A Yes, on a national basis.

Q Were you Commissioner when the Haynie Corporation was taken over by Zapata? A When it was taken over by Zapata?

Q I don't know. I was going to ask you. A I don't know. I became Commissioner in what, July 1, 1971?

Q Let me go the other way, sir. I read in the paper the other day Zapata-Haynie is a California corporation engaged primarily in tuna fishing on the West Coast, and some menhaden fishing on the East Coast. Did you read that article? A No, but I am familiar with Zapata West Coast fishing interests.

Q Are you sure that Zapata-Haynie Corporation is a Virginia corporation? A They have given me affidavits to

my satisfaction that they are, that they meet the requirements of law in that [35] regard.

Q All right. A As did Seacoast when we issued them a license.

Q If Haynie, when it merged with Zapata, had become a Delaware corporation or some other corporation, it would have been prevented from fishing within Chesapeake Bay; would it not, by 28.1-60? A You force me to read this now. Let me just say they have to satisfy the requirements of 28.1-60, as well as 61, which deals with application for resident.

Q Doesn't that limit fishing within Chesapeake Bay to corporations which are Virginia corporations?

Mr. Moore: I think the wording of the statute is resident, and the question is how it is applied.

The Deponent: You know you are talking about corporations—

Mr. Willcox: This is off-the-record.

(Off-the-record discussion.)

Mr. Willcox: Back on-the-record.

By Mr. Willcox:

Q Mr. Douglas, you have just, at my request, perused the statute which prohibits fishing with the Bay to corporations other than domestic corporations. A I think that is correct, yes.

Q You have said earlier that you were concerned [36] about the predatory fishing habits of foreign fleets beyond the 12-mile limit, because of their effect upon fish stocks. A Yes.

Q Can you tell me on what basis you, or what is your basis for denying American fishermen who are not residents of Virginia the right to fish in Chesapeake Bay, and limiting that to Virginians only? A My basis is because that statute tells me so.

Q But it has nothing to do with the fishing practices; does it? A Of the nonresident fishermen?

Q Yes. A I don't know. I really don't know why.

Mr. Moore: I think you are getting into something he can't testify to, the rationale of something passed in 1938.

A (Continuing) We might suppose, but I don't know that I can answer that at all, in all fairness, Mr. Willcox.

By Mr. Willcox:

Q Do you impose, by law, any catch limitations on menhaden fishermen within the bay? A In terms of the total amount, or daily catch, or tonnage, or something of that nature, no, sir.

Q So in terms of managing the stock of menhaden fish within the Bay, you have no regulations which would differ as to [37] whether they were resident or nonresident fishermen? A Well, what regulations we do have that would constitute a management program, and there are some regulations, only apply to residents simply because under current statute residents only are allowed in here.

Q But you do not presently have any catch limitations on menhaden within the Bay? A Not per se. Now, I don't want to leave you with the mistaken impression there are no impositions of a management nature on menhaden fishermen. There are, such as mesh size in the net. So, you know, this may be—we hope this is a limiting factor as a conservation nature.

There are prohibited areas in the Bay. Namely, without going into the basic tributaries and smaller creeks—in other words, it is limited to the Bay proper, so to speak.

Q Those same limitations could be made applicable to any boat law, any fishing within the Bay? A Oh, yes. I have seen nothing about those that, you know, would imply that they could only be applied to resident, or a one-armed person versus a two-armed person, or anything.

Q A North Carolina boat using the same regulations would have no more effect upon the fish than a Virginia boat using the same regulations? A Other than that is an extra boat in the Bay, yes.

Q Do you limit the number of Virginia boats in the [38] Bay? A No, sir.

Mr. Willcox: I have no further questions.

Mr. Moore: I have a couple more.

Redirect Examination

By Mr. Moore:

Q Mr. Douglas, did you say previously that general appropriation tax dollars which go to your agency, the Marine Resources Commission, are used in management and conservation programs of fisheries in the Bay? Maybe I need to rephrase it. A You lost me by one point there, if you will.

Q Is it fair to say that the general appropriations of the Legislature to this agency are used in part for management and conservation of the fisheries resources in the Chesapeake Bay? A Yes. The general funds appropriation—all general fund appropriations that come here, we think, can be shown

to be part of an integrated fisheries management plan in all of Virginia's waters. Obviously, the Chesapeake Bay, you know, constitutes the majority of it. No question about that.

Q All right, sir. And, of course, who pays for this ultimately? Where do those general appropriations come from that the Legislature— A They are general funds, other than one special [39] fund dealing strictly with oysters.

Q In terms of taxes, who pays the taxes that support those funds? A The general taxpayer.

Q Of what state? A Of Virginia.

Q Thank you. With regard to Section 28.1-81(1), this is the alienage bill, you expressed concern with regard to the decreased fish stocks in the offshore waters outside of the 12-mile limit resulting in part, at least, from, in your opinion, predatory practices by foreign fishing interests. Is it a fair statement that the enactment of the state law in question here was in anticipation, and would close a loophole in Virginia law which would have allowed those same foreign fishing interests to enter Virginia waters whenever they pleased?

Mr. Willcox: Let me note an objection to this. In the first place, it is a very leading question, and in the second place, Commissioner Douglas said it wasn't his bill to begin with.

A Yes. Could I—may I address that point? I think that maybe I am trying to anticipate what both counsel are trying to drive at. It seems to me that the distinction that we have to make here is that I personally don't have any great fear, as I think Mr. Willcox is trying to bring out, that suddenly the Russian fishing fleet is going to be in the Chesapeake Bay. [40] That, obviously, isn't going to happen, because—or we hope it isn't going to happen—because of

the very things he pointed out, that even when you buy—first of all, you have got to already have your vessels enrolled in the United States fisheries. It is my understanding that the Russians are not going to be allowed to enroll their vessels in U.S. fishery and come inshore with them.

There is the ability to buy U.S. vessels already enrolled in the fishery, such as several firms have already done. Mr. Willcox points out there is a procedure whereby they have to be approved somewhere at the Federal level. I think the problem that I personally would see is not vessels, but more of a philosophy and disregard for both law enforcement, which I am charged to enforce, and you must get some voluntary compliance in this game if you are going to effectively enforce your regulations. You have to have people out there who are not totally disregarding what you are trying to do, and if they have a vested interest, if it is stock on which they have historically fished, they tend to have that interest, as opposed to the Soviets, or Poles, or foreign efforts that we have been talking about.

So it seems to me that the problem that I would see, and that this bill, and new law would prevent, is it would prevent this kind of philosophy from coming into waters that have historically been managed by Virginians for Virginians, and [41] have supported Virginians' fishing industry.

You know there has to be a distinction between suddenly an invasion of foreign vessels into Virginia waters. I don't see that.

By Mr. Moore:

Q But is it fair to say you personally know of no law which would have prevented such foreign interests from entering Virginia waters through domestic corporations established here, except this statute itself; is that correct? A Yes. I think I testified to that earlier.

Mr. Moore: That is all.

A (Continuing) Can I go back and say that the question, when you said what was—I don't know what the intent of the Legislature was when they passed it, or know why, what protection they were trying to give us. I am just saying that last statement is a protection that I see that it has given us, or does give us.

Mr. Moore: All right, sir.

Mr. Willcox: Excuse me.

Recross Examination

By Mr. Willcox:

Q As to that last question, that is an incomplete answer; isn't it, because there is a procedure for requiring the consent of the United States Department of Commerce? [42]
A I acknowledged that, yes.

Q Well, I believe in answer to Mr. Moore's last question, you said the only law you knew that would prevent that was the Virginia law. Is it not true, in addition to the Virginia law, they would have to have gotten the consent of the Department of Commerce of the United States? A You may be correct there, because at the time that this law was being enacted, I was unaware of what procedures were at the Federal level for accomplishing this. Now, I must say that I still don't know the details of that. We are not that interested in it. We have not been. I don't know whether that has any limiting factors concerning size of vessels or not. You know, I gather that that Federal procedure deals with the enrollment of a vessel, documentation of a vessel. The Virginia law deals with alienage per se. You know, that is 100 percent stoppage, providing it meets the 25 percent

requirement, or whatever the stockholders. So in all honesty to you, that is correct.

There would appear to be one other avenue of addressing this problem, however effective or ineffective, or adequate is the term used, it may be, which I didn't know about at the time the bill was being passed. I am aware of it now, but I don't know whether that addresses all cases which might conceivably arise where a foreign interest would want to buy vessels documenting the American fishery. I don't know that I [43] am saying—

Q If it did then? A Then there is one avenue that we could probably take. Again, I don't know what their rules and regulations are. I understand they have held hearings on some and summarily granted, or denied others without a hearing.

Q Now, I ask you one last question. You have responded to Mr. Moore by posing a possibility of foreign interests acquiring the existing United States documented vessels, and suddenly depriving Virginia of its fish by sucking up all the fish within the three-mile limit, at its worst. Can you tell me of any situation on the East Coast with which you are familiar where a foreign interest have acquired an existing corporation and have thereupon engaged in depredatory, impulse fishing, or any of the kinds of fishing within the three-mile limit that you think are a real threat?
A No. I personally know of no instance that I can point to where the foreign interest has come in and has done the things that we fear might be done.

Mr. Willcox: Thank you.

Mr. Moore: One further question.

Further Direct Examination

By Mr. Moore:

Q In the event the United States Congress were to [44] extend the 200-mile, extend the United States fishery zone from 12 to 200 miles, would you then anticipate the possibility that foreign interests may look toward other avenues of getting at our resources probably through state involvement of corporations in the state, fishing in Virginia waters.

Mr. Willcox: I have to object to the question as being leading, and object to the question as speculating, and all the rest.

The Deponent: I can't answer that. I can only say this, which goes back to a question that Mr. Willcox asked, or a subject that he opened the door on. That is that I do—I anticipate that any passage of the 200-mile legislation will not, in its very nature, exclude foreign fishing in that 200 miles. I anticipate from all I know from my sitting with the State Department and so forth that there will still be foreign fishing, you know, incurred, but under terms and conditions that the United States would impose. I anticipate that the foreign fishing effort would be, under that 200-mile regime, would be reduced from what it is now without it. Whether or not that imposes any pressures on them to seek other ways, you can suppose as well as I.

Mr. Moore: All right, sir. That is all I have.

The Deponent: Is that a fair enough statement?

Mr. Willcox: Off-the-record.

[45] (Off-the-record discussion.)

(And further this deponent saith not.)

(Signature waived.)

W. JACKSON DAVIS was sworn and deposed on behalf of the defendant, as follows:

Direct Examination

By Mr. Moore:

Q Dr. Davis, where are you employed? A I am employed at Virginia Institute of Marine Science, where I am Assistant Director and head of the Division of Fisheries, Science and Services. In that capacity, I am in charge of the fisheries research and advisory activities in that Institute.

Q You have a doctorate in what field? A My major is in zoology. My minor is in botany.

Q All right, sir. How long have you been with the Institute? A 12 years.

Q How long have you been in charge of the fisheries research project? A The total fisheries program since 1972. Before that, I was head of the Department of Acanthology for about five years, and in that capacity I was head of the—was in charge [46] of the programs relating to fin fish, in contrast to shellfish, crabs, oysters.

Q Are you familiar with the characteristics of life cycle feeding habits, spawning and so forth of menhaden? A Yes, I am.

Q Do menhaden spawn in waters off the Virginia coast? A Yes, sir. They spawn in waters, in ocean waters off the Virginia coast, predominantly in the fall and early winter, from November through January, perhaps February.

Q After the spawning, where do the newborn fish reside, in the offshore waters or—

Mr. Willcox: May we suggest that you not lead him quite so much?

Mr. Moore: Do you want me to restate the question?

Mr. Willcox: Let him describe the menhaden cycle.

Mr. Moore: That will be easy enough.

By Mr. Moore:

Q In Virginia waters, that is? A All right. Spawning, the eggs hatch at sea. The larvae drift shoreward, and sometime in the course of the winter or early spring, enter Chesapeake Bay where they spend their first year, approximately. A little less than a year, actually. The larvae enter the Bay, as I said, in late winter, early spring. They stay in the estuarine waters in the Bay proper, or more likely in the saline portions of the tributaries to the Bay, [47] through that summer, and perhaps into early fall, leaving the Bay. Then in October or November, some proportion of those that nurse in the Bay remain there through the winter. More in the warm winters such as last winter was, for example, than in cold winters. Just what proportion of them are there nobody really knows, to the best of my knowledge.

Q You spoke of a period— A That gets you through the first year. Well, you asked for the menhaden life cycle.

Mr. Willcox: Why don't you keep on going?

A Okay. At the end of the first year then, as they leave Chesapeake Bay, they go to the south. Precisely where these fish winter is not known. But fish tagged as juveniles in Chesapeake Bay, and in waters to the north of Chesapeake Bay, have been captured as one year olds in the spring as far south as Florida, and along the south Atlantic shore.

Tagging also indicates that, and this tagging program has been conducted not by our laboratory, but by the National Marine Fisheries Services, and its predecessor organization, Bureau of Commercial Fisheries. This tagging program indicates that, in the case of Chesapeake Bay, in the neighborhood of two-thirds of those fish that were tagged as zero age group, young year fish, about two-thirds of those return as one year olds the following year. They either return or never left, or in any case, they are still there. They are caught. [48] Two-thirds of those that are caught as one year olds are caught in Chesapeake Bay. So in the spring then, one year old fish return to Chesapeake Bay. They reside in the Bay for the summer. In the fall, the situation is repeated. Some of them, at least, leave the Bay and go to the south to wintering grounds not precisely known. Some may remain in the Bay over the winter.

As two-year olds the following spring, they return. A considerable portion of these fish again return to Chesapeake Bay, and again spend the summer there. Those here are the basis of Chesapeake Bay fishery. At the end of the second year, they leave the Bay and again go south.

And the three-year old fish the following year come up the Coast again, and few, if any, three-year olds enter Chesapeake Bay. At this stage, they enter—they become—well, perhaps you might say more migratory than they were in their first two years of life.

The three-year old fish occur off the, along the ocean beaches off Virginia, predominantly off New Jersey, I guess, and those fish that survive the firing and predation again go south for the winter, apparently, though the whereabouts in the winter is not fully known. And move north again in the following summer, this time going further north, and this pattern is repeated.

Menhaden are known to live approximately 12, though [49] very few make it to that age. Each summer they move

a little further north up the Coast, so that you would find off New York, or Connecticut, Rhode Island, in that area you would find predominantly four- and five- year old fish. In years when there are fish in the Gulf of Maine, they are predominantly five, six or older.

The movement of these fish is more—well, I started to say erratic. It is more erratic at the northern end of the range, in that they seem to be temperature limited, and in some years there are fish in the Gulf of Maine, and some years there aren't. This depends in part, apparently, on water temperatures, and in part on age structure of the population at that point in time.

Q Dr. Davis, you referred to fish zero age, which would be those, I take it, who had recently spawned or hatched or whatever is the proper word? A Recently hatched.

Q And you indicated—what months do those fish spend in the Chesapeake Bay, those recently, or approximately—I realize— A Let's say spawning occurs in November off of Chesapeake Bay. It would probably be December or January, perhaps, by the time fish spawned in November entered Chesapeake Bay. They would then remain in Chesapeake Bay or its tributaries from that time through to October, November or December.

[50] Q That is approximately 10 or 11 months; is that correct? A 10 or 11 months, and some, especially in mild winters, would stay there through the entire winter and through the next year.

Q Was it also your testimony, I believe, that of those newly-born which have spent one winter there, and then leave to go south the following winter, was it your testimony that two-thirds of the one year olds caught in the Bay are tagged as those which have spent the previous summer

there? A Yes. That is approximately right. And again, I reiterate these are not my tagging data. They are developed by NMFS lab in Beaufort.

But of the one—let me think how to put this more clearly.

Juvenile fish, that is zero age group fish tagged in Chesapeake Bay, or of the zero age of the fish tagged in Chesapeake Bay, zero age group, two-thirds of those that are caught, two-thirds of the tags returned will be returned from Chesapeake Bay.

Q All right, sir. What age group menhaden are characteristic of Chesapeake Bay, if there is any age group that is characteristic? A Ages zero, one and two.

Q One and two-year olds and— [51] A The zero's, which are the newly-hatched fish which nurse here, the purse seine catch, or the commercial catch in Chesapeake Bay is approximately 90 percent one's and two's. The proportion of one's and two's make up different from year to year as the strength of year class differs, but the catch consists of about that, something on the order, if I remember correctly, about 6 percent of the catch is zero's, and the remainder—I lost track of where I am in these percentages now, but most of the remainder of that is three-year old fish.

Q So I believe, according to your statistics, that it would be approximately 4 percent of the catches in the Chesapeake Bay would be three and older. Three years old and older? A Yes?

Q And what about the northern areas, for instance Narragansett Bay? What are the characteristics, if any age group of fish, menhaden in that Bay, if you know? A The menhaden spawn in that area also, and in contrast to the

fall spawning in this area, they spawn there in the spring or early summer, I guess. So zero's would occur in Narragansett Bay, but the bulk of the population would be fish of, well, probably four years, zero's, and then four and older. I don't know the percentages, percentage breakdown in that area to the extent that I do in Chesapeake Bay.

Q How would the migratory pattern of three- or [52] four-year old fish in Narragansett Bay compare with migratory patterns of zero, one's and two's in the Chesapeake Bay off Virginia? Would they be similar? Would the level of migration be greater in one place than the other? A I don't know that I would—what do you mean about the level of migration? If they winter—they obviously migrated further if they are all wintering in the same southern ground, they weren't stopping in Chesapeake Bay to get their first.

Q I am not referring to the distances they migrate. I believe, and you correct me if I am wrong, but you indicated that three-year olds and older are, "more migratory." A Well—

Q Didn't you just make that statement? A I don't know. I wasn't listening. I think they are, yes, in that they are more migratory in the sense that they move further north up the Coast, and in the summer they have a longer period of migration. They reach their summering grounds later in the year than do the fish coming into Chesapeake Bay. And they seem to be less stable in their summer home.

These older fish seem to sort of drift on up onto the northeast, up the Coast through the course of the summer. Not the entire population, because they are always menhaden along the Coast. But there seems to be a sort of continual drift of these fish up the Coast through the course of the summer, whereas [53] the immature fish, those in

the various nurseries, such as Chesapeake Bay, seem to be a more stable population. They take up residence for a period of time in that area, and stay there rather than being sort of a drifting population.

Striped bass is a fish that has similar behavior.

Q All right, sir. Are you familiar with the season, the legal season for the taking of menhaden in Virginia? A Generally, yes. I may have lost track of the closing date a little bit. It was changed a year or so ago. The season opens on the—this is the season for taking menhaden with purse seines now. They can be taken with pound nets at other times, anytime, but the season for fishing with purse seines opens on the last Monday in May, and it closes sometime in December. I have forgotten exactly when it is. It is the first, second or third week in December. It was extended two weeks. It seems to me it used to be the first of December, and a couple of sessions ago it was extended two weeks.

Q Does this period of time coincide with the period of time when the fish, the menhaden in the Chesapeake Bay are reasonably resident there and stable as a population? A Approximately so. The fish enter the Bay a little before the opening of the season. Usually there are fish available for, again, depending on how the season is going, how rapidly the weather warms, there are fish available for a month to a few weeks before the season opens, and in some years the [54] southward migration is pretty well completed before the season closes, and in other years, as I indicated, some fish over-winter in Chesapeake Bay.

Q Based on your knowledge of fisheries, is the taking of menhaden, the fishing for them generally done during the time when the fish are in active migration down the

Coast? A Well, menhaden are fished from, on the Atlantic Coast they are fished from sometime in May until around Christmas, or occasionally into January, into a week in January or so. So, yes, in places they are fished, of course, during the migration. They are fished in Chesapeake Bay through the summer when they are not in the course of a migration. They are on their summering ground. The only place that menhaden are not fished, or the time they are not fished is during the winter, from the period of around—well, January, February, March, April.

Q Well, in your review, which is the greater—which status of the fish is involved in the greater amount of fishing activity? Are they fished more in migration, or fished more while they are in these bays, and in fairly stable populations? A Well, the Virginia fishery—

Q In Virginia. That is what I mean. A Okay. The Virginia fishery is based largely on the stable summering population here in Chesapeake Bay.

[55] Q All right. Now, are you familiar with what used to be called the North Carolina coast fall fishery, or winter fishery? A To some extent, yes, sir.

Q What did that involve? What was the—first of all, what was the activity of the fishermen themselves? How was the fishery undertaken? A It is a purse seine fishery.

Q Located where? A As it is elsewhere. It is centered in Beaufort, Morehead City. The boats operate, or did operate out of these ports. The situation is changed somewhat right today because of a number of reasons.

Q Well, is that a fishery which, fishery activity which attempted to catch migrating menhaden? A Yes.

Q When did that take place? It was in the fall; wasn't it, or was it? A That is right. It was called the Carolina fall fishery, yes. It started sometime in late November, or mid to late November, ordinarily, and extended to around Christmas. Ordinarily, they try to stop before Christmas so the men could get home for Christmas.

Q What has been the result in recent years of that fishery? Has it been successful, good, or has the fishing been —[56] A Over the past few years it has not been very good. The catch has declined in comparison with say the '50's, early, very early '60's.

Q Would that in your opinion indicate any decrease in the level or amounts of migration by menhaden down the Coast? A Well, inasmuch as we don't really know where these things winter, it is difficult to answer that question precisely. It certainly could. That is one plausible explanation that the fish in the past few winters have not come as far south, have not migrated to the extent that they did back in the heyday of the Carolina fall fishery.

Q Did you have anything to add to that? I didn't mean to cut you off? A Well, I might conceivably say that another explanation—it doesn't seem to me as logical, is that the migratory pattern changed and they are migrating offshore, or are not showing at the surface in schools like they did formerly. But the last couple of winters have been somewhat mild, and I expect that the fish have just not come this far south.

Q When did the National, if you know, when did the National Marine Fisheries Service begin its tagging studies of menhaden fish? Do you have any idea? A In the mid to mid '60's, or the latter half of the '60's. I don't remember precisely.

Q Are you aware of any tagging studies that might [57] have been done in the '40's, or '50's? A No, no, I am not.

Q All right, sir. Now, is it your opinion that the results of these tagging studies have made some changes in scientists' views as to the nature of menhaden fish and their habits, their migratory patterns and so forth? A Well, yes. Really they have been the basis for describing the migratory pattern. But what has happened, when the tagging program started, the menhaden population was at a very low ebb. I think the first results that were gotten from the tagging program, as the population has, as the menhaden population has recovered, have shown not to be typical, or perhaps typical of the age groups and fishes that were available for tagging at that point in time. And now that we have had a broader spectrum of fish available, I think the data coming in from the tagging programs over the past few years perhaps is a better picture of the general situation, with the reservation that migration seemed to be somewhat temperature related, so that it may not be possible to speak of a typical migration. We may have to say this is the warm winter pattern, and this is a cold winter pattern, for example.

Q Turning your attention again to the comparison between the Chesapeake Bay, and perhaps Narragansett Bay in Rhode Island, you indicated, I believe—well, what age group menhaden fish would you expect to find in and around the Rhode [58] Island waters during the season, the summer season? A During the fishing season?

Q Right. A The zero's that were produced there by the adult spawners. The adult spawners would be mostly four years and older, I would think, at that latitude. So you would have a population of very young, or young of the

year fish, and then very few, if any, one's, two's and a smattering of three's, and then four's and five's.

Q And is it your testimony that three's and four's and five's are more migratory than one's and two's? A More migratory in the sense of traveling further in the summer. They move further to the northeast up the Coast than the one's and two's do. And perhaps more migratory in that the older fish seem to, through the summer, continue to drift onto the northeast, whereas the fish, the one's and two's in Chesapeake Bay, don't continue to move. They enter Chesapeake Bay, and perhaps only because it is a closed system, when they get to the Susquehanna River they can't go anywhere else. They don't continue to drift along. Those that enter Chesapeake Bay seem to stay put through the summer here.

Q Would you expect then a more stable population in the Chesapeake Bay, or in Narragansett Bay during the season? A I am not certain I know precisely what you mean by stable. I guess more stable in Chesapeake Bay, in any one year. [59] Certainly more stable in the other sense of in the long-term history there are more one- and two-year old fish than three's, four's and five's, back in the late '60's, for example, when the menhaden population was at a very low ebb. The fisheries remained in Chesapeake Bay, one- and two-year old fish, whereas there was essentially no fishery on further up the Coast on older fish, apparently because there was so few of them it wasn't economically feasible to fish them.

Mr. Moore: That is all I have.

Cross-Examination

By Mr. Willcox:

Q Perhaps because all the one's and two's were caught in Chesapeake Bay, and nobody grew to be three or four? A Indeed, that was part of the problem.

Q Dr. Davis, menhaden are migratory fish; are they not? A Yes, they are.

Q And migratory implies they move around? A Yes.

Q What is the definition of a migratory fish? A Well, I suppose one which moves from one, from a place, from place to place within its range seasonally for any of a number of purposes. Some fish are migratory for purposes of spawning, as shad and salmon, for example, which spend part [60] of their life at sea. They migrate into fresh water spawning areas, and the adults then either die or return to sea. Others migrate, apparently, in response to temperature changes. And there are, of course, degrees of migration illustrated by various sorts of fish. Tuna, for example, being very highly migratory, moving a few thousand miles in the course of a summer, and other fish moving much less migratory. There are others that migrate into a different degree in different stages of the life cycle. Striped bass, for example, are rather sedentary. They remain in the area in which they spawn until they reach an age of around three or four years, and then they begin a coastline, coastwise migration.

For example, striped bass that spawn right here in the James River, remain in the James River until they are three or four years old, and then they begin a migration up the Coast in the summer, and back down here to spawn in the winter.

And they, like menhaden, move a little further north each summer once they start the migratory phase of their life.

Menhaden are sort of between tuna and striped bass, in that they don't have a sedentary stage totally, or as already indicated, that some menhaden probably do have a sedentary stage. They may remain in Chesapeake Bay. Those that spawn offshore may remain in Chesapeake Bay for nearly two years before they begin migrating, and before they make their first southward trip. They [61] then come back into the Bay the following summer and are sedentary for a while. And then as three-year olds, they become increasingly migratory, or move further north. This is not an unusual pattern in fishes along the Atlantic Coast.

Fluke has, summer flounder has a somewhat migratory pattern.

Q If you were to chart menhaden, you would have a series of ellipses; would you not, along the Atlantic Coast? The older they get, as you mentioned, the four's and five's would have a longer ellipse, or higher ellipse reaching further north as they got older? A Well, diagramatically, yes.

Q And are there menhaden in the sounds and inlets off the coast of North Carolina? A Yes.

Q And are they one's and two's, or what would you find down there in the summertime? A Predominantly one's and two's.

Q The same thing you find in Chesapeake Bay? A Yes. Fewer two's as you go further south.

Q And how about Delaware Bay? What would you find up there? A Delaware Bay is, as the southern estuaries are trending toward one's, the more northern estuaries, Delaware Bay would be trended more toward two's.

[62] Q Is that substantially similar to what is in Chesapeake Bay? A Delaware Bay, I suspect, would

have more one year olds, more two-year olds than, a higher proportion of two-year olds than Chesapeake Bay has.

Q And as the tagging program suggests, if there has been one in Delaware Bay, about two-thirds of the zero's tagged come back to Delaware Bay? A I am not familiar with the fate of those fish that were tagged as juveniles in Delaware Bay, or indeed if they were.

Q Are you familiar with any tagging program other than that in Chesapeake Bay? A I had a conversation with Bob Chapoton two or three weeks ago, in which he indicated that juveniles tagged in Massachusetts or Connecticut, or Rhode Island—I am not certain now which he said, that is zero age fish there, were caught as one year olds as far south as Florida, and some throughout the south Atlantic. So this indicates that the fish that occur, the juveniles produced in the north Atlantic moved to the south in the winter.

Q Can you tell us where the other one-third of the juveniles tagged in Chesapeake Bay showed up, the one-third that doesn't come back and get caught in Chesapeake Bay? A Predominantly in the south Atlantic. Predominantly south of Chesapeake Bay.

[63] Q And do you find other tags in your Chesapeake Bay catches? Well, I guess that is the only question I can ask you. Are they catching fish tagged other than in Chesapeake Bay? A Yes.

Q Do you know where they come from? A I can't give you a precise listing in general from—you might expect one year old fish in Chesapeake Bay that were spawned anywhere to the north of here, and a few to the south.

Q And those that enter Chesapeake Bay as spawn—I

guess that is the right term—are hatched where, if you know? A They are hatched in the Atlantic Ocean off the Virginia Capes, or in the general area of—it is practically impossible to say that precisely, because there is no way of putting a label on a fish some half-inch long and tracing it.

Q About 100 miles from the Capes? A From the current patterns—well, that is a reasonable ball park figure, perhaps. I wouldn't want to literally limit it and say none from further than that get here. The general current pattern indicates that they could come from somewhat further than that, but that is reasonable.

Q And after spawning, do they generally seek coastal waters, be they the Carolina Sound, or Chesapeake Bay, or Delaware Bay? A Yes. The menhaden are estuarine dependent, and the juveniles spend their first year in an estuary somewhere or [64] other.

Q And insofar as you know, would the pattern in other estuaries be largely the same, that is that at the same longitudinal, same weather level that the ones would return for its second year? A Well, of course, there is only one Chesapeake Bay at that latitude, and it occupies it.

Q For instance—excuse me. A The one's do not return to areas north of Chesapeake Bay to any appreciable extent. Some probably go into Delaware Bay. But beyond Delaware Bay there are few one year old fish. The one's seem to come about to this latitude, the latitude of Chesapeake, Delaware. This is about the northern extent of their migration. They occur in the summer from this latitude south.

Q And on the other hand, would the one's then be likely to return to the Beaufort-Southport area? A Yes. One's do occur there.

Q Further south? A Yes.

Mr. Willcox: That is all.

Redirect Examination

By Mr. Moore:

Q Dr. Davis, your last answer included the statement that one year old menhaden don't generally, or aren't expected [65] generally to migrate northward past perhaps Delaware, or Virginia's Chesapeake Bay, or at least Delaware Bay; is that correct? A They become increasingly scarce. Yes, the predominant summering ground of the one year old's is south of Delaware Bay.

Q Then is it fair to say that you would not expect as many one year old tags in Narragansett Bay to be fish which spent their nursery summer in Narragansett Bay? Would there be as high a percentage of one year old's returning to Narragansett Bay as there would be one year old's returning to Chesapeake Bay? A No. No, there would not.

Q You also indicated that migration in terms of numbers—I am talking about migration in terms of numbers of the total fishery that will migrate—not distances that they migrate. You indicated that migration levels were related to temperature conditions. The winter, the coldness of the winter and waters, and so forth. Will you expect more menhaden to winter in the Chesapeake Bay as opposed to Narragansett Bay, or points north, or vice versa? A I would expect more overwintering in Chesapeake Bay than north of here.

Q Is it a fair statement to say that the characteristics, in terms of migrating, migratory habits, [66] volumes of

migration, would be different in Virginia waters, particularly in Chesapeake Bay, from those that may be found in bays and bodies of water north of Virginia? A Well, there it seems to me is what I just said in answer to your previous question. The further north you go, the less overwintering there is. The fewer young fish, fewer one and two-year old fish there will be. This is what I was alluding to in comparing menhaden a few minutes ago, menhaden with striped bass. The striped bass have a sedentary early life history stage. Menhaden have a semisedentary early life history stage in which they, their summering area, where they seem to form a sort of stable population, not moving through, is from approximately Chesapeake Bay south to Georgia.

Mr. Moore: I think that is all I have.

Recross Examination

By Mr. Willcox:

Q Dr. Davis, if you were counting three's and four's, you would find more of them north of here than you would in Chesapeake Bay; right? A Yes, yes. Certainly in the summertime.

Q One might argue if you all didn't catch so many one's and two's in Chesapeake Bay, there would be more three's and four's north of here? A That is indeed the truth.

[67] Q And if there were less one's caught south of here, there might be more two's in Chesapeake Bay? A Yes.

Q Is that correct? A That is indeed true.

Mr. Willcox: We thank you.

(And further this deponent saith not.)

(Signature waived.)

(Whereupon, the depositions were concluded at 4:33 P.M.)

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

**DEPOSITION UPON ORAL EXAMINATION OF
ROBERT B. CHAPOTON
TAKEN ON BEHALF OF THE PLAINTIFFS**

Norfolk, Virginia

October 28, 1975

Appearances:
Willcox, Savage, Lawrence, Dickson & Spindle

By: Thomas H. Willcox, Jr., Esquire
James C. Howell, Esquire
Counsel for the Plaintiffs

James E. Moore, Esquire
Assistant Attorney General
Counsel for the Defendant

* * *

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[2] Deposition upon oral examination of Robert B. Chapoton, taken for de bene esse purposes on behalf of the plaintiffs, before Frances P. Zahn, CSR, a Notary Public for the Commonwealth of Virginia at Large, taken pursuant to stipulation of counsel, commencing at 2:00 P.M. on the 28th day of October, 1975, at the law offices of Willcox, Savage, Lawrence, Dickson & Spindle, 1800 Virginia National Bank Building, Norfolk, Virginia; and this in accordance with the Federal Rules of Civil Procedure.

ROBERT B. CHAPOTON was sworn and deposed on behalf of the plaintiffs, as follows:

Direct Examination

By Mr. Willcox:

Q Please tell us your name, age and present residence? A Robert B. Chapoton; 45; reside at 211 Knox Drive, Morehead City, North Carolina 28557.

Q By whom are you employed and in what capacity? A I'm employed by the National Marine Fisheries Service. I'm the leader of the menhaden assessment task, situated at Beaufort, North Carolina 28516.

Q And how long have you been employed by that organization? A 18 years.

Q Is it funded by the United States? [3] A Yes.

Q And is it the principal menhaden research facility in this country? A Yes.

Q What is your professional education, background? A All right. Attended Michigan State University at East Lansing for approximately six years, have a bachelor of science in fishery biology and a master of science in fishery biology.

Q Do you belong to any professional organizations? A Yes. American Fishery Society, American Institute of Fishery Research Biologists, a number of lesser ones.

Q Have you served as a professional adviser to various Government organizations as respects your specialty of menhaden fisheries? A I have been the spokesman for the national fisheries program, menhaden research, at scientific and technical meetings held by the Government, both relative to meetings with the foreign countries and the U.S. Government with its own domestic industry.

Q Is there an international agreement on menhaden fishing beyond the 12-mile limit? A Yes. There are presently two in force, one with the Soviet Union and one with Poland. They agreed to abstain from fishing northern Atlantic menhaden from January through [4] April annually in an area extending from Virginia to Florida.

Q Does this same agreement prohibit United States vessels from fishing in the same area during the same period? A Yes. This would be outside of the 12-mile limit, okay?

Q Would you describe for us generally the spawning and and migration cycle of the Atlantic menhaden? A Spawning occurs in each month of the year. However, with the onset of migration of the adult fish from southern waters, those waters below Cape Hatteras—comma, comma—the fish will spawn as they migrate up the Coast, commencing in March, and will continue spawning until they reach New England waters in mid summer.

They have thus spawned off Virginia, Chesapeake Bay, Maryland waters in the spring in April or May. Spawning will continue again in New England waters in August and September. Then the fish will migrate southward in the fall and there again they will spawn off Delaware Bay and

Chesapeake Bay in the fall, principally October and November.

Spawning will continue possibly by the same fish off North Carolina in December and January.

We find the newly-hatched eggs and larvae of Atlantic menhaden from the Coast waters out to as far as 110 miles off the coast of South Carolina, North Carolina during the winter.

[5] The Atlantic menhaden female first spawns at reaching age three.

Q Are the vast majority of the Atlantic menhaden spawned in the open ocean? A Yes.

Q A fish spawned—all right. The egg hatched, or whatever it is that occurs, off North Carolina in the wintertime would normally move where? A It would normally move toward the Coast, requiring an average of about a month and a half to two months before it reaches brackish or estuarine waters, inside waters.

If spawning occurred south of Cape Hatteras, that larva, that young fish would likely enter estuaries along the North Carolina to Florida coast.

Q And assume a larva hatching north of Cape Hatteras, what would his pattern be? A Going up the Coast, those that were hatched off the mouth of the Chesapeake Bay, even out as far as 60 miles, would tend to work towards the Chesapeake Bay or Delaware Bay area, and then further north, fish hatching in and along Long Island, New York would eventually inhabit estuaries of Connecticut, Rhode Island, Cape Cod.

Those above Cape Code, above, in the Boston to Maine area, would inhabit estuaries in that locality as near as—as far as we know at this time.

[6] Q What would be the travel pattern of a larva hatched off the Virginia coast or the North Carolina coast north of Hatteras which entered Chesapeake Bay as a larva? Where would he normally spend the next two or three years? A Normally, fish entering—young larvae entering Chesapeake Bay would migrate through the open Bay waters and would ascend one of the many tributaries either in the Chesapeake Bay—either in the Virginia portion of the Bay or in the Maryland. The eastern shore or the western shore.

That fish having entered the Bay or tributary in either the spring or the fall, but principally over one winter, would feed and grow in the tributary until—or through that next summer and until the fall period. Maybe September, October, the fish might leave the tributary, enter the Bay water, and if it is not caught as a young juvenile fish, would do one of two things: It would either overwinter in the Chesapeake Bay; that is, the second winter of its life, and contribute to landings, or reside in the Bay that next year as a one year old fish, or it would possibly move, migrate out of Chesapeake Bay southward in the fall, in October and November; and it would appear in the waters south of Cape Hatteras within a month or two after leaving Chesapeake Bay, principally in November or December.

It might continue southward and enter the landings that next year as far south as Florida in the latitude of Jacksonville, Florida, as a one year old fish.

[7] Q All right. And where would that—first, insofar as you have current knowledge, considerably more fish leave the Bay than overwinter that first year, is that correct? A That's a no answer.

Q You don't know, or the answer is no? A No. It's a no answer.

Q Meaning what? A Let's see.

Q Do more juvenile fish stay over that second winter or leave the Bay for their second winter? A Available information, based on tag returns of marked individual fish, marked as juvenile fish in the estuaries, in the tributaries of Chesapeake Bay, indicate that the—well, let's see now. Indicate that the majority of fish, possibly in the 60 percent range, would enter the landings as one year old fish in the Bay proper, or in the waters immediately adjacent to the Bay mouth.

Evidence to date is nonconfirming relative to the fate of some of these fish, because return tag information reveals that some fish from the same stream will migrate out of the Bay and contribute to landings south of Cape Hatteras, North Carolina in November or December as juvenile fish, and then the next year in June or July, some of these same cohorts will appear in landings in Chesapeake Bay. Therefore, we don't know at this time the precise movement pattern percentage-wise of all the fish [8] that are marked in Chesapeake Bay and return in the Bay.

Does that make sense to you?

Q I'm not sure. Specifically, sir, I understand that you say upwards of 60 percent, or a majority, certainly, of the one year old fish which were tagged as juveniles are caught in Chesapeake Bay in their first year, or after their first year. A Yes.

Q My question is do you know whether that 60 percent spent the preceding winter before they were caught in the Bay or outside the Bay? A No. We do not have direct evidence as to that point.

Q But you do know that more than half, better than 60 percent of those which were tagged as juveniles and which

were recovered, more than 60 percent were recovered in their first year in Chesapeake Bay? A Yes.

Q Does that percentage decrease as the fish grows older? A Yes.

Q Are more fish found further north as the fish—more fish originally tagged in Chesapeake Bay, say, as juveniles in their first year, the majority are recaught in Chesapeake Bay. In their second year, the same, I would understand. A It depends on the year.

[9] In recent years, the majority of the caught fish have been of age two. In certain years—or in some years—we get a higher percentage of the tagged fish marked as juveniles back the second year than we do the first year.

It has to do with the behavior and distributional pattern of the total population along the Coast.

Q I think your last answer had to do with the number of fish, not where they were caught. The two-year old fish tagged as juveniles in Chesapeake Bay, are the majority of the two-year old tagged returns returned from Chesapeake Bay? A Can you restate that, please?

Q Okay. I'll try. Do you find many three-year-old fish in Chesapeake Bay? A No, sir.

Q All right. So a fish tagged as a juvenile in Chesapeake Bay by his third year is largely living north of Chesapeake Bay, is he not? A Yes, sir. Except possibly in the fall, where, contrary to a summer fishery, where we would normally expect it to be south of here, having taken place in the fall migration southward.

Q But in any event, there are very few three-year-olds within Chesapeake Bay. They are either in the ocean north of here or in the ocean south of here? A That's right.

[10] Q And even fewer four-year olds in Chesapeake Bay? A That's correct.

Q Now, how about the two-year olds? Are there less two-year-old tagged fish, less percentage-wise, found in Chesapeake Bay than one year olds, speaking of those which were tagged initially in Chesapeake Bay and are caught in their second year somewhere? A The answer is no. Some years we find more two-year olds with tags in them in Chesapeake Bay than we found as one year old fish.

Q Are you referring now to total fish or percentage of the tags? A Both. Some years, the age one fish, marked and unmarked, do not enter the fishery in proportion to their true abundance in the population.

Sometimes their true abundance is not indicated until they enter the fishery as two-year old fish.

Q In terms of the numbers of fish spawned, which are in Chesapeake Bay, during their first year—I don't mean as one year olds. Not during their preone period. A Right.

Q Okay. Are the vast majority of those fish initially outside of Chesapeake Bay? A Yes.

Q Something like 95 percent? [11] A Our best estimate is that it would approach that area of 95 percent, yes. 92, 95 percent.

Q So that regardless of whether or not they spend their first winter or their second winter in Chesapeake Bay, they originated outside the Bay in the ocean somewhere? A The great majority, yes, sir.

Q And since the mothers are all three-year olds or better, very few of the mothers are found within Chespeake Bay? A In general terms, yes, sir.

Q So that the repopulation of Chesapeake Bay itself is dependent upon three-year old or older fish laying eggs in the ocean somewhere? A Yes, sir.

Q As opposed to within Chesapeake Bay? A Yes, sir.

Q Are you familiar with the Atlantic and Gulf Coast menhaden fisheries? A Yes, sir.

Q Is menhaden fisheries a significant portion of the American fishing industry? A Yes. It contributes annually about 45 percent of the total commercial catch of all U.S. fishermen, fresh water and marine species combined.

Q Is it the largest single fishery in terms of a single category of fish? [12] A Yes, it is.

Q Are there certain localities, towns or counties or states which regulate the type of equipment used in menhaden fisheries, which can be used. A Would you restate the question, please?

Q Well, do you know of any municipalities, state or local, which limit the quantity of fish that may be caught? A No, sir.

Q Are there some, however, which say that you can or cannot use purse seines or can or cannot use a certain size opening in the net, or are there certain regulations of that nature? A There are to my knowledge.

Q And are they applicable to whoever is doing the fishing, so far as you know? A Oh, yes. Yes.

Q Do you know of any location other than the Chesapeake Bay of Virginia where out-of-state fishermen are prohibited from fishing for menhaden by state law? A No, but that's probably out of my range of expert knowledge.

Q But you know of none? A I know of none.

Q You are aware that Virginia law prohibits nonresidents from fishing within Chesapeake Bay for menhaden? [13] A I have been told that that is true, yes.

Mr. Willcox: Answer Mr. Moore.

Cross-Examination

By Mr. Moore:

Q Dr. Chapoton, you said that—I believe—you correct me if I am wrong—that the majority of the juvenile menhaden which will be found in Chesapeake Bay during the summer months were spawned in offshore waters adjacent to Virginia's East Coast, is that correct? A Yes, sir. That's the great majority.

Q Great majority? A Yes.

Q Now, after they are spawned and move into Chesapeake Bay, if they were—how long a period do they spend there which would be called their nursery period? A It would be through their first summer of life up until—

Q So the ones in the fall, spawned and brought in in the fall, would remain approximately 10 months, maybe 11 months? A That's right.

Q Those that are spawned in—did you say some spawned in the spring in the Bay also? A Yes.

Q Those would spend maybe six or seven months; is [14] that correct? A Yes. That's correct.

Q All right. After that first nursery summer, you indicated, I believe that a portion would leave the Bay and migrate; and I believe you said southward; and that a

portion would winter in the Bay, remaining there; is that correct? A That's correct.

Q Is there any question that a portion of those nursery juveniles do winter over one full winter in the Bay and then another summer? A We have indirect evidence that they—to answer the question—we have tags from the marked fish only during the commercial purse seining season. The appearance of tags in the landings from the purse seine fishery, the summer after we've marked the fish in the estuaries as juveniles, would be enough evidence that they have not left, say, the Chesapeake Bay during the preceding winter, or absent fishing. So it's indirect as to their exact location during the nonfishing season.

We do have other reports, however, relative to the appearance and presence of the properly sized fish in the Bay during the wintertime which leads us to believe that the fish do in fact overwinter in the Bay.

Q I see. All right. Thank you.

Is migration by menhaden in any way related to temperature of the water and the air, their environs? [15] A It may be. We have no direct evidence or experiments to prove it either way.

Q I see. Do you have any evidence or studies which lead to any conclusions regarding whether or not temperature relates to the migrations? A Temperature probably is a measure, a causal agent; but there is insufficient evidence to show that temperature is the only agent.

Migration, or movement, of the Atlantic menhaden fish, as evidenced from tagging and subsequent recapture at some distant point, is coincidental, however, oftentimes with a change in the water temperature.

Q All right. Thank you.

Is it fair to say—now, I'm not trying to put words into your mouth. You correct me if I am wrong.

Is it fair to say that temperature would be one factor at least which you suspect bears upon the need to migrate? The colder temperature would indicate a need to migrate for the fish in the winter; is that accurate? A I would agree with that.

Q One of other factors. All right.

Would you expect—you've indicated that some fish winter in Chesapeake Bay. Would you expect, based upon your studies and experience, that more fish would migrate in—excuse me—would winter in Chesapeake Bay as opposed to a bay north of [16] the Chesapeake area, perhaps Delaware Bay or Narragansett Bay, talking about wintering populations? A Available information indicates that the bay—the Atlantic menhaden in the bays to the north of Chesapeake Bay, including, say Delaware Bay, Narragansett Bay, Long Island Sound, and waters north of Cape Cod, Massachusetts would have proportionately fewer absolute and percentage-wise numbers of menhaden during the overwinter period, during the wintertime.

Q All right. Are you familiar with what has been termed the North Carolina winter or fall menhaden fishery? A Yes, sir, I am.

Q Can you explain what that term or phrase was used to indicate in the industry? A Ten or more years ago, the Atlantic menhaden population would appear off the waters below Cape Hatteras and immediately adjacent to the Beaufort-Morehead City-Cape Lookout area in November and December.

In the 1950's, the catch from this area would approximate—approximate one-third of the total Atlantic catch that year.

The catch was based mostly on those fish that were two, three, four, five and six year olds; and it was generally agreed by the members of the fishing industry, vessel captains and other knowledgeable persons that the fish had arrived there from more northern waters, including Chesapeake Bay, in the fall.

[17] Q All right, sir. Has that—have you completed your answer? A Go ahead with your next question.

Q All right. Are you aware of the success of the industry in capturing fish in that manner in the North Carolina coastal areas during the fall migration in recent years? Has it been a successful fishery? A The North Carolina fall fishery in recent years has decreased. Catch has decreased in recent years to a level which is one-tenth or less than in former years.

The catch in 1974 was the lowest on recorded history, dating back to at least 1935.

There was a slight improvement in the 1975 catch wherein about 16,000 metric tons were landed.

The catch was mostly of juvenile fish.

Q Has this phenomenon caused scientists of your type to change their views or question prior assumptions and views regarding the levels in terms of numbers of fish that migrate south during the winter? A Yes. For the most part.

In the last 10 years, roughly speaking, there appears to be less of a definite movement or exodus from the northern waters, including Chesapeake Bay, to the waters adjacent to North Carolina into the area formerly supporting the fall fishery.

[18] Q I recognize that the seasons for the fishery vary from year to year. I mean, from state to state. And I recog-

nize you're not expected to know the exact seasons, but assuming for purposes of this discussion—and I think this is accurate—that the fishing season for menhaden in Virginia runs from the months—from the time period, late May through early December; would it be fair to say that the fishing for menhaden in Virginia waters would be an activity in—let me rephrase the question.

If you are fishing for menhaden in Virginia waters during the season from May through December, would you be capturing a body of fish that are in migration, or would they be fish that are in a rather sedentary, stable population? which, if either? A Okay. Sort of neither. It depends on the seasons within that season.

In the spring, meaning April or May, when fishing commences, it would be both on fish that had apparently overwintered in Chesapeake Bay, as well as on fish that had arrived from more southern waters in the spring.

During June, July, August, September, you would be principally fishing on fish of local origin in the general term.

In the fall, October and November, you would again begin fishing in part at least on fish that had arrived here from more northern waters on their movement south, and this would continue on into December when the season closes.

[19] Q Would you indicate that in the latter summer and early fall months, you might be fishing on fish arriving from northern waters migrating south? Would this be true of the taking of menhaden in Chesapeake Bay during those months, as opposed to coastal waters in the three-mile limit? A Oh.

Q My idea is— A Maybe I missed it.

Was your question before rather in Chesapeake Bay or Virginia waters?

Q I should have said the Bay. A Okay. My answer pertained to the Bay.

Q All right. A As well as to the coastal Virginia waters extending out 12 miles.

Q Let me see if I can pursue that last question.

Your answer seemed to be related to the origin of the fish that would be caught during the season in Virginia. I'm concerned about whether or not the activity of taking the fish would necessitate navigating up and down the coast between states in order to take the fish, or is it fair to say that fishing activity is generally pursued through a rather stable operation of fishing in one state's waters for the fish, if they are there, as opposed to following them in migratory patterns up and down the coast? [20] A Oh, yes. Most of the vessels that catch fall menhaden have a restricted or limited range of fishing. The great majority, 95 percent, perhaps, of the fish landed in Chesapeake Bay reduction plants, or plants located in Virginia on Chesapeake Bay, would be receiving catches from Virginia—fish caught in Virginia waters.

Q All right, sir. A Either along the outer Virginia Capes or from Chesapeake Bay proper. Okay?

Mr. Moore: I think that's all I have.

The Deponent: Sorry about that.

Redirect Examination

By Mr. Willcox:

Q Mr. Chapoton, the nature of the industry is such that the companies, the major companies, anyway, have plants in a number of areas; isn't it? A Yes, sir.

Q And the boats tend to operate from a given plant; is that correct? A That's correct.

Q And this is true whether it's boats operating out of plants in the Beaufort plants or boats operating out of plants in the Fort Monmouth area or boats operating out of plants in the Reedville area; is that corect? [21] A That's essentially corect.

Q And when there were lots of fish in the Atlantic fishery off of—the Atlantic fall fishery off of Beaufort, were there Virginia boats down there catching them? A Yes, sir. But they were operating out of North Carolina plants at that time.

Q And were there boats owned by the Zapata-Haynie Corporation as well as Seacoast Products, to your knowledge, operating in the Atlantic fishery, fall fishery, while there were fish there? A Yes. Or their successor—preceding company.

Q Okay. And they would tend—the boats which might have fished in Chesapeake Bay operating out of Reedville moved with the fish to Beaufort and operated out of Beaufort-oriented plants owned by their respective companies? A That's correct.

Q And when the fish disappeared from the fall Atlantic fishery off of Beaufort or Southport, do you know where they went in terms of congregating in some other area, or what? A Direct evidence is lagging. However, surveys for eggs and larvae of the menhaden fisheries in the south Atlantic area; that is, from Cape Hatteras, North Carolina to northern Florida, indicate that the fish were as far offshore as 110 miles, but that they were not at the surface, and no visible signs were made.

[22] Q And our vessels, as well as those of other countries, were prevented from fishing for them by the agree-

ment that you mentioned earlier? A Yes, sir. Since about 1972.

Q Now, when the fish became scarce in the Atlantic fall fishery area, was any change made in the Virginia fishing season? A Yes. It's my understanding that about 1970 or '72, a law was changed in Virginia relative to the closing time in November or the first of December.

Q Was the result of that change to extend the fishing season in Virginia further into the winter? A According to my understanding, yes, sir.

Q So that at about the same time there were fewer fish off North Carolina, then Virginians were permitted to fish longer for them in Virginia waters? A Yes, sir.

Q And are a significant number of the total fish caught in the Atlantic menhaden fisheries caught within Chesapeake Bay? A Yes, sir.

Q Would you estimate how many of the total menhaden catch comes from Chesapeake Bay? A In recent years, it has changed from about 50 to about 69 percent on an annual basis.

[23] Q And do you keep statistics on menhaden fish landings? A Yes, we do.

Q Are you prevented by law from disclosing that information where there are less than two fishing companies in a given area? Or less than three; excuse me. A Yes, sir, I am, by regulation.

Q And are you prevented by that law from disclosing the details of the menhaden fish landings in the Chesapeake area of Virginia? A Yes, sir.

Q So there are then less than three menhaden fishermen in the Chesapeake Bay area? A There are now, yes, sir.

Q And the only two that are there are Zapata-Haynie and Seacoast—excuse me—Standard Products? A Yes, sir.

Q At this time? A At this time.

Mr. Willcox: Off-the-record for a minute.

(Off-the-record discussion.)

By Mr. Willcox:

Q Referring to your data for fish which were taken in 1971, can you tell us where the fish—well, first, what is the north Atlantic area geographically? [24] A For this purpose, the north Atlantic is tributaries in the States of Connecticut, Rhode Island and Massachusetts.

Q And what area is enclosed by what you term the mid Atlantic? A Mid Atlantic is New Jersey, lower New York and Delaware.

Chesapeake Bay is the Virginia and Maryland portion of Chesapeake Bay.

The south Atlantic is North Carolina to Florida, including South Carolina and Georgia.

Q Now, of the fish tagged in 1971 as juveniles in the north Atlantic area, what percentages ultimately turned up in which areas? A Within the next three years, we've received—10 percent of the tagged fish returned were returned from the mid Atlantic area; 85 percent of the returned tags were returned from Chesapeake Bay area; and 5 percent of the tags returned were returned from the south Atlantic, all within the next three years.

Q And of those tags in the mid Atlantic area, what was the same information? A In the mid Atlantic, 6 percent

of the tags were returned from that area; 74 percent were returned from Chesapeake Bay; and 20 percent were returned from the south Atlantic area.

Q And of those tagged originally in Chesapeake Bay, [25] where were they? A Within the next three years, 5 percent of the returned tags were returned from the mid Atlantic area; 25 percent were returned from the Chesapeake Bay area—I'm sorry. I misquoted. 62 percent were returned from the Chesapeake Bay area and 33 percent from the south Atlantic area.

Q And how about those tagged in the south Atlantic? A 3 percent were returned in the mid Atlantic area; 25 percent were returned from Chesapeake Bay; and 72 percent were returned from the south Atlantic area within three years after release as juvenile fish.

These data are viewed by us as being typical based on tagging prior to 1971 and since 1971.

Q Mr. Chapoton, just for information, what was the total number of fish tagged in the year we're talking about? A There were 33,117 juvenile fish tagged in 1971.

Mr. Moore: I want to ask him a couple of questions about those, and I'll give this back to you if you need to refer to it. I just want to refer to it.

Recross Examination

By Mr. Moore:

Q Dr. Chapoton, you say that based on the information you've just recited for us from this chart we're referring to on the returns, you indicate, I believe, that for fish tagged in 1971, [26] of the total number tagged in the north Atlantic region as juveniles, only 10 percent returned to the north Atlantic area, or showed up as catch in the north Atlantic area after three years. Is that— A That's correct.

Mr. Willcox: In the first three years, not after three years.

By Mr. Moore:

Q In the first three years. Is that during three years? A Or within—they were returned as two-year-old fish and they were returned as three-year-old fish.

Q So throughout the three-year period, you accumulated 10 percent of the original group back as catch in the area in which they were tagged in? A Not quite. The tagging was in the north Atlantic and the returns were in the mid Atlantic.

Q Excuse me. All right. A That's all right.

Q Now, that's fish tagged in the north Atlantic region; is that correct? A That's correct.

Q Now, comparing that with those tags in the Chesapeake area, including Virginia and Maryland, of the total number tagged in 1971, during the three years, what percentage returned to the [27] same area in which they were tagged, the Chesapeake area? A 62 percent returned.

Q All right. Going— A Or were found in the catches in the next year or the year after that or the year after that.

Q Now, let's compare that with the mid Atlantic region. Mid Atlantic region, you indicate, I believe, that of the total number tagged in 1971, only 6 percent returned to the mid Atlantic region as catch. A Yes, sir.

Q Then is it fair to say that there's a significantly greater degree of return of those fish which spawned in Virginia waters as compared to those which spawn as juveniles in the waters north of Virginia in the mid Atlantic and New England region? A That's correct.

Q Is it also true then that—is it fair to say then that the populations of menhaden fish do not have the same characteristics of migration and seasonal patterns in one area of the country as they might have in another? A I would agree with that.

Mr. Moore: That's all I have.

Further Redirect Examination

By Mr. Willcox:

Q Mr. Chapoton, that varies with the age of the fish, [28] does it not? A Yes. And with the size of the fish.

Q And if you had been keeping the same statistics seeking only the numbers caught in their fourth or fifth years, as opposed to their first three years, would you have expected that the figures would have been reversed and there would be a far higher number in the north Atlantic area than in the Chesapeake area? A That is true, based on all available information.

Q And this is because the older fish are found farther north, or caught farther north? A That is correct.

Q And there are very few four- and five-year olds, or even three-year olds, in Chesapeake Bay? A That is correct.

Q No matter where they were born? A The center of the population at this time in mid 1970's—comma, comma, you know—appears to be along the Coast from Delaware Bay to Chesapeake Bay southward to North Carolina.

Let me strike that, because I was getting to a new point.

Would you get me again on that?

Q All right. What I asked you was the three, four, five

and older fish, however old they get, are found in substantial numbers north of Chesapeake Bay rather than within it? [29] A Yes, sir. That's correct.

Q And this is not dependent upon where those same fish were spawned? A Not to our knowledge.

Q For whatever reason, the older fish prefer the northern waters, or seem to prefer the northern waters? A They appear to, yes.

Mr. Willcox: I have no further questions.

Mr. Moore: One last question.

Further Recross Examination

By Mr. Moore:

Q Of the yearly catch total in the menhaden industry, what age fish make up the bulk of the commercial catch of menhaden, if you know, based on tag support? A Well, based on tag returns, as well as on daily sampling of the commercial landings throughout the range, in the last three years; that is, 1973, '74 and the current year, 1975, about 70 percent of the total antes are of age two fish.

Normally, it's one and two-year olds with some appreciable contribution from three-year olds.

The fish live to 10 years of age, but there are not normally many fish over seven years of age.

Mr. Moore: Thank you.

[30] Further Redirect Examination

By Mr. Willcox:

Q Do you have an opinion as to the—I guess in terms of crop management or supply management, do you have an opinion as to the ideal makeup of the catch? That is,

what percentage of the total catch should consist of one or two or three or four-year olds? A Studies done by us in recent years indicate that under an ideal average, the catch should be composed of approximately two-thirds one and two-year old fish, those that have not spawned, versus about one-third of those fish three years and greater. That is, those that have spawned or are of spawning age.

Q And in the last few years, what percentage of the total catch has been represented by the less than three-year olds? A Approximately 70 to 80 percent of the total Atlantic catch has been composed of juvenile and one and two-year old fish.

Mr. Moore: I'm all through.

Mr. Willcox: We thank you.

You have the right to have this written up and read it before it is submitted to the court. You also have the right to waive that check and reading, if you are so inclined.

[31] Under the circumstances, we, I think, would recommend that you waive it, but that's your prerogative.

The Deponent: Would it be possible to have a reading over the telephone and to make corrections if any are needed? I'll pay the cost.

(Discussion off-the-record.)

(Signature waived.)

(Whereupon, the deposition was concluded at 3:10 P.M.)

[Jurat omitted in printing]

* * *

STATUTES INVOLVED

Section 28.1-60, Code of Virginia (1950), as amended, found in Volume 5A at page 94

(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Section 28.1-81.1, Code of Virginia (1950), as amended, found in Volume 5A, Supplement, at page 29

(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens of the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of its

stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five per centum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than tweny-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

Section 1081. Prohibition Against Fishing in Territorial Waters; Exceptions

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species

within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.